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Supreme Court, U.S.
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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAGDISH P. BERRY, *et al.*,

Petitioners,

v.

PROFESSIONALS, INC. and
PROFESSIONALS I, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two corporations sued the Berry brothers, builder/developers of residential housing projects, for RICO (18 U.S.C. § 1961 *et seq.*) violations in the conduct of two such projects. The corporations were awarded $1.5 million in trebled damages and obtained an order from the court divesting the brothers of a substantial part of their interests in the corporations. The award and order present two important, unsettled and recurring questions:

1. Should a plaintiff be permitted to recover treble damages under RICO for injuries caused directly and proximately by embezzlements and conversions and only indirectly and remotely by predicate acts of mail and wire fraud?

2. Does RICO permit a private plaintiff to institute proceedings for and obtain an order divesting defendants of their interests in corporate enterprises?

LIST OF PARTIES AND RULE 29.1 LISTING

The parties to the proceedings before the United States Court of Appeals for the Fourth Circuit were petitioners Jagdish P. Berry, Virendra Berry, Surendra K. Berry, Berry Associates, and A.J., Inc. and respondents Professionals, Inc. and Professionals I, Inc.

In addition to the parties set forth above, Magno P. Rogue and Arwind K. Pathak were plaintiffs in the original proceedings before the United States District Court for the Eastern District of Virginia. Sohail Ahmad, John E. Garlitz, Akhil K. Govil, Vijay Kumar, Baljeet S. Mahal, P.P. Mehrotza, S.L. Sandhir, Harjit S. Sidhu, Qumar U1 Zaman, Mohammed Idress, Samuel N. Nava, Romulo Villanueva and William P. Dale were also parties to the original proceedings as third-party defendants.

The corporate petitioners state that they have no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners Jagdish P. Berry, Virendra Berry, Surendra K. Berry, Berry Associates and A.J., Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above entitled proceedings on April 2, 1992.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit dated April 2, 1992, sought to be reviewed and the Order denying the Petition for Rehearing dated May 13, 1992, are reprinted in Appendix E at p. 32a.

The Memorandum Opinion and Findings and Order of the United States District Court for the Eastern District of Virginia dated March 25, 1991, after re-

mand, is reprinted in the Appendix C at pp. 15a, *et seq.*

The first unpublished opinion of the United States Court of Appeals for the Fourth Circuit dated January 25, 1991, is reprinted in the Appendix B at pp. 9a, *et seq.*

The original Memorandum Opinion and Order of the United States District Court for the Eastern District of Virginia dated November 24, 1989, is reprinted in Appendix A at pp. 1a, *et seq.*

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was decided on April 2, 1992. A Petition for Rehearing was timely filed on April 16, 1992, and denied by Order dated May 13, 1992.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the fourth Circuit is invoked under 28 U.S.C. § 1254(i).

STATUTE INVOLVED

The statute involved in this case is the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.* The particular sections of RICO at issue in this petition are 18 U.S.C. § 1962 and 18 U.S.C. § 1964. These sections are reprinted in the Appendix B at pp. 9a, *et seq.*

STATEMENT OF THE CASE

Professionals, Inc. and Professionals I, Inc., Virginia corporations formed to develop two residential

housing projects in Fairfax County, Virginia, and their shareholders, brought an action for damages against petitioners alleging violations of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 *et seq.* They also asserted pendent state law claims of fraud, breach of fiduciary duty, and breach of corporate opportunity. The petitioners are three brothers, Jagdish, Virendra and Surendra Berry and two companies, Berry Associates, Inc. and A.J. Inc., owned by the brothers. The original complaint was filed in the United States District Court for the Eastern District of Virginia and was dismissed shortly thereafter on the grounds that the "enterprise" alleged in the RICO counts was the same as the defendants and thus violated the rule of *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). The plaintiffs were granted leave to amend and an amended complaint was filed which revised the RICO claims and repeated the original pendent state law claims.

A three-day bench trial ensued. According to the Fourth Circuit, the following was established at that trial:[1]

> The Berrys owned and operated Berry Associates, a real estate development firm in Northern Virginia. In early 1985, the Berrys began to solicit capital contributions from investors in Virginia and Maryland to finance the purchase of two parcels of land. In early 1986, the Berrys and the investors purchased two properties, Beu-

[1] There were two appeals and two opinions by the Fourth Circuit in this case. This summary of the trial evidence is taken *verbatim* from the second opinion.

lah Road at a cost of $820,000 and Greenbrier at a cost of $432,000, and titled them in the plaintiff corporations. After Jagdish Berry was elected president of Professionals, it contracted with Berry Associates to develop the sites in exchange for 30 percent of the profits realized from eventual sales.

Over a three-year period, the Berrys and Berry Associates diverted approximately $500,000 from Professionals through various means. These included causing Professionals to pay salaries to Berry family members, some of whom performed no services. By purchasing and reselling a Greenbrier lot on the same day, the Berrys diverted a profit of $28,600 from Professionals. They wrote checks to themselves, other family members, and Berry Associates totalling approximately $60,000 purportedly to cover services rendered for Professionals, yet they were unable to substantiate the expenditures. Without authorization, they borrowed money from Professionals and, although the loan was not repaid, directed its accountant to prepare financial reports indicating that the debt had been satisfied. False check register entries made by the Berrys, on which the accountant relied, further skewed the reports. Communicating by wire and mail, the Berrys continuously provided the shareholders with false or misleading reports of the financial condition of Professionals.

During 1986 and 1987, the Berrys opened corporate bank accounts for three construction companies that did not maintain business records or pay taxes and were not registered as required by

> Virginia law. These corporations presented falsified invoices in excess of $325,000 that were paid from funds of Professionals.
>
> Alarmed by their inability to obtain complete and detailed financial information and because of other problems plaguing the development of Beulah Road, Professionals' shareholders began to question the management and operation of Berry Associates. In an effort to minimize their losses, Professionals voted to sell Beulah Road and contracted with a buyer. The Berrys attempted to block this sale by filing suit in state court. Subsequent litigation resulted in consent decrees directing the Berrys to conduct a shareholders' meeting, prohibiting the Berrys from transferring assets of Professionals, and allowing the shareholders of Professionals access to corporate documents. By the end of 1988, Professionals removed Jagdish Berry from his position as president.[2]

Appendix D, pp. 23a-24a.

The Fourth Circuit's evidence summary supports in all respects petitioner's principal contention in this case, that the injuries were not proximately caused by RICO violations but were instead proximately

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[2] Petitioners have a single observation about the Court's summary of the evidence. It said "[i]n an effort to minimize their losses Professionals voted to sell Beulah Road and contracted with a buyer." There were no "losses" in this case. There were only diminished profits. All the evidence was to the effect that one of the properties, Greenbrier, was developed according to plan and at a profit to the investors and the other, Beulah, was sold undeveloped but at a profit to the investors of $1.2 million.

caused by common law embezzlements, conversions and breaches of trust and fiduciary duty. Not only is that what was proven at trial, that is what was alleged in the amended complaint which contained six RICO counts.

It is probably sufficient for the purposes of this petition to point out first that the judgments below could only have been entered on two of the six counts, Counts I and III, and that the plaintiff in each of them was one or the other of the two corporate plaintiffs. See Appendix F, pp. 51a-56a.[3] Count I alleged that the petitioners conducted the affairs of Professionals, Inc. (also known as the Greenbrier Corporation) "through a pattern of racketeering activity including fraud, embezzlement" in violation of 18 U.S.C. § 1962(c) and (d). It further alleged that the plaintiff Professionals, Inc. was damaged in the aggregate amount of approximately $500,000 by the acts of fraudulent conversion, embezzlement and the removal of money. Professionals, Inc. asked for a judgment in the amount of $500,000 trebled and that the petitioners be "divested" of any interest they had in the Greenbrier Corporation. Appendix F, p. 53a. Count III alleged that the petitioners received income from Professionals, Inc. through a pattern of racketeering activity, "fraudulent embezzlement," and invested part of it and thereby acquired their interest in Professionals I, Inc. (also known as the Beulah Corporation) in violation of 18 U.S.C. § 1962 (a), (b) and (d). It further alleged that the plaintiff Profes-

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[3] In Counts II, IV and VI which duplicated Counts I, III and V, the individual shareholder/investors were the plaintiffs. In Count V two enterprises were alleged, Berry Associates and A.J.Inc.

sionals I, Inc. was damaged by an act of embezzlement of approximately $15,000, and that it was required to expend approximately $l00,000 to investigate "the fraudulent activity and scheme and an unspecified amount to defend "frivolous litigation." Professionals I, Inc. asked for a judgment in the amount of $150,000 trebled and that the petitioners be "divested" of any interest they had in the Beulah corporation. Appendix F, pp. 55a-56a.

Petitioners filed an answer and a counterclaim, one Count of which was their own RICO claim. In the RICO claim and nowhere else in the counterclaim, petitioners alleged that all of the plaintiffs embezzled at least $l,890,000 from them, including approximately $155,000 invested by them in one of the plaintiff corporations Appendix G, p. 71a, ¶ 132B. and approximately $90,000 invested by them in the other. Appendix G, p. 71a, ¶ 132C. They sought treble damages from the plaintiffs in those amounts, *inter alia*, as part of what "the plaintiffs have embezzled or otherwise illegally taken" from them. Appendix G, pp. 73a-74a, ¶ 226, B and C. Before trial, the plaintiffs moved to dismiss the entire counterclaim and this was granted as to the RICO claims against the corporations "because the Court construes the counterclaim as asserting in the RICO claims that those corporations are the enterprise." Appendix E, p. 31a. Order of October 13, 1989.

Following the trial the Court issued Findings of Fact and a Memorandum Opinion and Order in favor of the plaintiffs. The plaintiffs' proposed findings of fact were adopted in almost their entirety by the Court. What remained of petitioner's counterclaim was dismissed because "there was absolutely no evi-

dence" adduced on it. Appendix A, p. 4a. The claims of the shareholder plaintiffs were also dismissed and the damages attributable to the pendent fraud and breach of fiduciary duty counts were held subsumed in the RICO damage awards. Judgment was entered in favor of Professionals I, Inc. (the Count III plaintiff) in the amount of $490,560, trebled to $1,471,681 and in favor of Professionals, Inc. (the Count I plaintiff) in the amount of $12,700 trebled to $38,100. The Court also ordered that "the defendant's interest in Professionals I, Inc. is declared to be limited to $50,000 and in Professionals, Inc. to $55,000." Appendix A, p. 7a.

An appeal was taken to the Fourth Circuit in which several issues were raised. Petitioners asserted, *inter alia*, that the predicate acts found by the district court did not cause the injuries claimed by the plaintiffs and that the district court erred by expanding the civil remedies available to private litigants under RICO to include the broad equitable relief of divestiture. Throughout their brief, petitioners complained of a lack of clarity in the District Court's Order and Memorandum Opinion and the Fourth Circuit, in an unpublished opinion, held that "the district court's failure to make specific findings prevents an adequate review" and therefore remanded for proceedings consistent with its opinion.

Specifically, the Fourth Circuit said:

> In its opinion, the district court adopted with minor changes plaintiffs' proposed findings of fact and summarily concluded that defendants' conduct constituted a RICO pattern. The district court, however, did not make specific findings as

> to what conduct by the defendants constituted "racketeering activity" pursuant to section 1961(1). It ignored the comprehensive provisions of section 1961(a) which alone enumerates all conduct which may constitute "racketeering activity." On the present record, it is impossible for this court to determine what conduct of the defendants the district court found to be "racketeering activity." With regard to whether a "*pattern* of racketeering activity" existed, the record is similarly devoid of specific findings as to the time period over which the racketeering activity took place. At no point did the district court make specific findings as to when the acts of "racketeering activity" began, when they ended, or whether they caused plaintiffs' injuries. While we certainly sympathize with the case load of the district court and the many demands upon its time, we cannot adequately review the district court's determination that a "pattern of racketeering activity" existed without more specific findings on what acts of "racketeering activity" occurred, the length of time over which they were committed, and whether they caused plaintiffs' injuries.

Appendix B, pp. 13a-14a.

On the remand, the district court directed the parties to submit proposed findings of fact addressing those matters raised in the opinion of the Court of Appeals. Petitioners did this and specifically requested that the district court clarify which of the plaintiff corporations were injured by the racketeering activity and in what way as part of determining, as the Court of Appeals directed, whether the predicate

acts proximately caused injury to the plaintiffs. See Appendix C, p. 15a. They also pointed out that because the prevailing plaintiffs were the corporations and not the individual investors, the judgments awarded necessarily were for lost profits and not for fraudulently induced or lost investments by the shareholders. The district court declined to provide the requested clarification but it made more specific findings as to the predicate acts. It identified twenty-seven (27) mailings it found to be acts of mail fraud (18 U.S.C. § 1341) and thirty-one (31) telephone calls it found to be acts of wire fraud (18 U.S.C. § 1343). Appendix C, pp. 16a-19a.

Concerning the mailings, the Court said that each of them were done "with the intent to carry out some essential step in the execution of the 'scheme to defraud,' " that each was "an act of 'racketeering activity' " and that together they amounted to a "pattern of racketeering." Appendix C, p. 19a. The Court held that "[t]his scheme and these acts caused and were designed to cause the damages sustained by the plaintiffs. They permitted the Berrys to obtain the assets of the plaintiffs, retain them, and forestall the plaintiffs' investigations by false assertions and threats." Appendix C, p. 18a. With respect to the telephone calls, the Court repeated that they were made with the intent to carry out some essential step in the execution of the scheme to defraud and held that "with the mailings, these calls were the proximate cause of the damages sustained by the plaintiffs." Appendix C, 19a. Otherwise, the Court ordered that the previous judgments "are hereby confirmed (and which have not been vacated)." Appendix C, p. 20a.

Petitioners took a second appeal to the Fourth Circuit. Again, they contended that the district court erred in awarding damages to the plaintiff corporations because their injuries were not proximately caused by the predicate acts. Again they contended that the district court erred by expanding the civil remedies available to private plaintiffs under RICO to include the broad equitable relief of divestiture.

With respect to petitioner's proximate cause contention, the Court of Appeals, in another unpublished opinion, characterized it as follows:

> The Berrys contend that the district court erred in finding that the predicate acts permitted the Berrys to obtain the assets of the plaintiffs, retain them, and forestall the plaintiffs' investigations by false assertions and threats. They attack this finding as insufficient to support causation for a RICO violation, arguing that at best the predicate acts gave rise to only a state law violation. Moreover, they maintain that Professionals failed to prove their detrimental reliance on the predicate acts, a prerequisite to recovery under RICO.

It went on to say:

> Evaluation of the RICO causation requirement includes consideration of "such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection." *Id.* at 1189. The Berrys orchestrated and undertook predicate acts to deplete Professionals of its assets. They provided false information regarding the nature, stability, and productivity of the in-

vestments, paid salaries to family members that did not perform services, wrote checks to themselves even though they rendered no compensable services to Professionals, clandestinely borrowed funds and never repaid the debts, directed production of false and misleading financial reports, and created fictitious construction companies through which the Berrys processed falsified invoices. These actions lulled investors into a false sense of security, allowed the Berrys to avoid payment of dividends and returns, and permitted the Berrys to divert the investigation.

The Court then held as follows:

We recognized the necessity of establishing detrimental reliance to prove an injury to business or property under RICO in *Morley v. Cohen*, 888 F.2d 1006, 1011 (4th Cir. 1989). The Berrys sought and obtained reliance on their actions by Professionals. Jagdish Berry portrayed himself, his family and Berry Associates as experienced real estate developers who had achieved success with past projects, and he represented to Professionals that these skills would be beneficial to the development of Beulah Road and Greenbrier. Indeed, like the plaintiff in *Morley*, the shareholders would not have made an initial investment with the Berrys, purchased a second property, or continued their association with the Berrys if they had known of the Berrys' illegitimate practices. We conclude that the district court did not err in holding that the predicate acts caused the injury sustained by Professionals.

Appendix D, pp. 29a-30a.

With respect to the Court's treatment of petitioner's contentions concerning the divestiture, it should be noted that respondent's counsel suggested for the first time during oral argument of the appeal that the divestiture of the Berry's interest in the plaintiff corporations resulted from the denial of the Berry's counterclaim, and not from the grant of relief plaintiffs had specifically prayed for in their amended complaint. In its opinion, the Fourth Circuit noted that "[a]dditionally, the Berrys and Berry Associates challenge the dismissal by the district court of their counterclaim for return of capital contributions and earnings." Appendix D, p. 23a. Thereafter it said:

> In their counterclaim, the Berrys alleged RICO and state law violations and sought various remedies including payment of the 30 percent development fee for the sale of the Beulah Road property. In addition to the return of their capital contributions, the Berrys also demanded that Professionals return approximately $1,500,000 allegedly invested in or earned through the development of the properties. The district court correctly dismissed the counterclaim, finding that the development fee was not owed to the Berrys and determining that the Berrys' interest in the properties was $105,000—the amount they originally invested. Raising the novel argument that dismissal of their counterclaim amounted to a grant of equitable relief to Professionals, the Berrys challenge the order of dismissal as beyond the power of the court. We find this argument to be without merit.

> The district court simply denied the Berrys the relief they requested.

Appendix D, p. 30a.

Petitioners timely petitioned the Fourth Circuit for rehearing on the issue of the district court's limitation of the Berrys interest in the properties to $105,000 instead of $243,522. They took issue with the Court's statements in its opinion characterizing their arguments on this issue as somehow challenging the Court's dismissal of their counterclaim and asserted unequivocally that the court clearly misperceived their position. They cited the language of the RICO counts in the complaint, the arguments respondents made to the district court and the language of the first Memorandum Opinion and Judgment Order of the district court in granting the relief as clear evidence that it was granted pursuant to a prayer for relief by the plaintiff and not because defendants lost on their counterclaim. Petitioners argued that the award to plaintiffs was a grant of equitable relief and that the court could not avoid deciding the issue of whether RICO authorizes such an award to a private plaintiff by calling it something else. On May 13, 1992, the Court denied the petition for rehearing. Appendix E, p. 32a. This petition now follows.

REASONS FOR GRANTING THE PETITION

I. Introduction

This Petition presents two questions which, under the Court's Rules, are appropriate for review on a Writ of *Certiorari*. The first, relating to civil RICO's proximate cause requirement, is a significant question of federal law which has not yet been precisely settled

by this Court and which was decided by the Court of Appeals for the Fourth Circuit in a way that generally conflicts with the Court's holding last term in *Holmes v. Securities Investor Protection Corp.*, ___ U.S. ___, 112 S.Ct. 1311 (1992). *See* Sup. Ct. R. 10.1(c). The second, whether the equitable remedies of RICO are available to private plaintiffs, is also a significant question of federal law which has not yet been settled by this Court. Moreover, the holding of the Fourth Circuit in this regard conflicts with earlier decisions of the Fifth and Ninth Circuits. *See* Sup. Ct. R. 10.1(a) and (c). In the first instance, then, the two questions presented are entirely appropriate for review under this Court's Rules and established precedents.

In addition, there are other less formal but perhaps more compelling reasons why this case is appropriate for review at this time. For one thing, it presents this Court with an occasion to discourage the misuse and abuse of the mail and wire fraud statutes as RICO predicates when only common law fraud is involved. It is propitious, we also suggest, that it gives this Court an early opportunity to refine further its holding in *Holmes v. Securities Investor Protection Corp.*, *supra*. Moreover, the issue of the availability of equitable relief to private RICO plaintiffs is a substantial one that will likely reoccur and will probably have to be decided by this Court sooner or later. Finally, while we recognize that the Court does not exist merely to provide another tier of appellate review, nevertheless, the decision below was simply wrong and it ought to be reversed.

II. A Plaintiff Should Not Be Permitted to Recover Treble Damages Under RICO for Injuries Caused Directly and Proximately by Embezzlements and Conversions and Only Indirectly and Remotely by Predicate Acts of Mail and Wire Fraud.

In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), this Court held that in a civil action under RICO "the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern." *Id.* at 497. Thus, the Court added, recoverable damages occurring by reason of a violation of RICO "will flow from the commission of the predicate acts." *Id.* Not unreasonably nor illogically, courts of appeals, including the Fourth Circuit, unanimously have read this to mean simply that for an injury to be compensable under RICO, it must have been *proximately caused by* the predicate acts. *Brandenburg v. Seidel*, 859 F.2d 1179, 1189 (4th Cir. 1988); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 167 (1991); *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir. 1989). If there was any uncertainty in these cases about the type of causation required, that uncertainty was addressed and resolved by the Court last term in *Holmes v. Securities Investor Protection Corp., supra*. That case specifically held that proximate causation, not merely factual or "but for" causation, is required as the nexus between the acts and the injury. *Id.* at 1318.

In their complaint, plaintiffs below alleged that they had been damaged in the approximate amount of $500,000 by acts of "fraudulent conversion, embezzlement and removal of money" and, having established losses in the amount of $503,260.38, they were

awarded three times that in damages. Moreover, they proved exactly what they alleged, that all of their damages directly resulted from and were measured by the conversions, embezzlements and presumably unlawful removals of money. These were not alleged to be, and indeed could not be, predicate acts under RICO.[4] On the other hand, the predicate acts which were alleged and proven, the mailings and the telephone conversations, were essentially neutral or harmless and caused no injury to the plaintiffs. On the remand, the district court found that their purport and effect was such that they permitted the petitioners "to obtain the assets of the plaintiffs, retain them and forestall the plaintiffs investigations by false assertions and threats." Appendix C, p. 18a. Therefore, the district court reasoned, the predicate acts proximately caused the plaintiffs injuries. The Fourth Circuit affirmed the district court in this regard. For two reasons, both courts were wrong.

First, it is a certainty that the district court did not have the benefit of the *Holmes* opinion and it is most likely that the Fourth Circuit did not have its benefit either.[5] Regardless, their holdings are inconsistent with the rationale of *Holmes*, if not of its actual holding. In that case, the Court did not establish any bright line boundary between proximate causation and factual or "but for" causation, but it did

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[4] As the Fourth Circuit noted in this case, 18 U.S.C. § 1961(1) "alone enumerates all conduct which may constitute 'racketeering activity.' " Appendix B, p. 13a. Conversions, embezzlements and unlawful removals of money are not enumerated as predicate acts under 18 U.S.C. § 1961(1).

[5] *Holmes* was decided on March 24, 1992. The Fourth Circuit decided this case on April 2, 1992, approximately a week later.

furnish some guidance in that regard. Its discussion of *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) suggested that one factor that should be strongly considered is "a demand for some direct relation between the injury asserted and the injurious conduct alleged," for, as the Court pointed out, "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors." *Id.* at 1318.

The racketeering activities alleged and proven in this case were violations of the mail fraud and wire fraud statutes. Both of these statutes require proof of a scheme to defraud and a use of the mails or wires in furtherance of the scheme to defraud. The district court found fifty-eight predicate acts in fifty-eight different uses of the mails and wires in furtherance of, apparently, a single scheme to defraud. Both the district court and the court of appeals went to lengths to describe how those acts furthered the scheme but neither court addressed at all how the acts injured the plaintiffs. We do not contest the finding that the "predicate acts" did advance the fraud scheme by some measure and in the manner described by the district court and that, for that reason alone, they could fairly be said to have caused the injuries. But only "indirectly" we say, because of the interposition of the direct causation by the acts of embezzlement and conversion. In short, the courts below were able to find causation only by utilizing a "but for" test which is now foreclosed by and inconsistent with *Holmes*. Or, if they are to be consistent with *Holmes*, they have unintentionally established two de-

grees of proximate causation, which no other court has ever done before. Accordingly, this case furnishes this Court with a ready opportunity to define and refine the boundary between factual or "but for" causation and proximate causation where RICO injuries are involved.

III. RICO Does Not Permit a Private Plaintiff to Institute Proceedings for and Obtain an Order Divesting Defendants of Their Interests in Corporate Enterprises.

The Court of Appeals approved the Order of the district court to the effect that "the defendant's interest in Professionals I, Inc. is declared to be limited to $50,000 and in Professionals, Inc. to $55,000." See Appendix A, p. 7a. Petitioners maintained below and maintain here that the Order, a grant of equitable relief to a private plaintiff, is not authorized by civil RICO.

There can be no dispute in this case that prior to the commencement of the trial below, the Berrys had invested a total of $243,522.03 in the two plaintiff corporations, $151,678.35 in Beulah and $91,943.68 in Greenbrier. Their ownership interests in the corporations were measured by the percentage that those sums bore to the total amounts invested by all the investors. There was evidence at the trial that $138,622.03 of the total amount they invested, $96,678.35 in Beulah and $41,943.68 in Greenbrier, came from embezzled or otherwise improperly obtained monies and the district court so found. As a result, damages three times $138,622.03, or $415,866.09 were awarded plaintiffs pursuant to their damage claim. In addition, the district court also entered the order limiting the defendant's interest in

the plaintiff corporations to only what they had originally invested, thereby divesting them of $138,622.03 of their investments.

All of RICO's civil remedies are set forth in 18 U.S.C. § 1964. Part (a) of § 1964 generally empowers federal district courts to grant certain types of broad equitable relief[6] including specifically injunctions, restraining orders and orders to any person "to divest himself of any interest, direct or indirect, in any enterprise." Part (b) authorizes the Attorney General, and only the Attorney General, to "institute proceedings under this statute" which language has been paraphrased by the Ninth Circuit as permitting "the government to bring actions for equitable relief." *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1082 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). Part (c) authorizes any person injured by reason of a RICO violation to sue therefore and "recover threefold the damages he sustains." This is the only provision in RICO which establishes a civil remedy for a private plaintiff.

This Court has never addressed at all whether equitable relief in general or divestiture in particular are available remedies to private RICO plaintiffs. But the broader issue of equitable remedies in general has arisen many times in lower courts, most frequently in cases where injunctive relief has been sought by a private plaintiff. Because § 1964 treats divestiture

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[6] The word "equitable" or the term "equitable relief" is not used in § 1964. It is settled, however, that divestiture is an equitable remedy, *United States v. E.I. DuPont De Nemours and Co.*, 366 U.S. 316 (1961) as are, of course, restraining orders and injunctions.

and injunctions in an identical manner, there is surely no good reason why the analysis as to injunctions would not apply in an identical manner to the analysis of divestiture. Two Circuit Courts, the Fifth and the Ninth, have directly addressed whether RICO allows injunctive relief to a private plaintiff and both have answered in the negative.[7] Three Circuit Courts, the Second, Fourth and Eighth, have expressed themselves on the issue in dicta, and only the Eighth has suggested that injunctive relief is possibly available.[8] Thus, the great weight of the Circuit authority to the effect that equitable relief under RICO is not available to private plaintiffs, is contrary to and in conflict with the holding by the Fourth Circuit in this case. It should be added here that in *Wollersheim*, the Ninth Circuit denied equitable relief to private RICO plaintiffs primarily because the statute makes no specific grant of the authority to do so. It said: "Where a statute provides an elaborate enforcement scheme that confers authority to sue on both government officials and private citizens, 'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens.' " Citing *Middlesex County Sewerage Authority v. National Sea Clammers*

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[7] *Religious Technology Center v. Wollersheim*, *supra*; *In re Fredeman Litigation*, 843 F.2d 821 (5th Cir. 1988).

[8] *Contrast Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 289 n. 20 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985); *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 28 (2d Cir. 1983); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) (injunctive relief unavailable), *with Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (injunctive relief possibly available), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983).

Association. 453 U.S. 1 (1981). In *Fredeman*, the Fifth Circuit followed *Wollersheim* in all material respects including reliance on *Middlesex County*, so it seem fair to suggest that the Fourth Circuit has contravened weighty authority in this case. What is even more remarkable, however, is the manner in which it attempted to disguise that it was doing this.

In its opinion, the Fourth Circuit first mischaracterized petitioners' simple and staightforward argument challenging the district court's power to grant the order "limiting" their investments in the corporations. It said that the Berrys thereby challenged the dismissal of their counterclaim, Appendix C, p. 23a, which they never did, "[r]aising the novel argument that dismissal of their counterclaim amounted to a greater equitable relief." Appendix C, p. 30a. This was never the contention of the petitioners. Moreover, saying that it was their position does not make it so any more than saying that "[t]he district court simply denied the Berrys the relief they requested," Appendix C, p. 30a, makes that so. The Court apparently overlooked the fact that petitioners' RICO claims against the corporations were dismissed prior to the trial "because the Court construes the counterclaim as asserting in the RICO claims that those corporations are the enterprise." Appendix E, p. 31a. Moreover, misstating the cause of the order cannot change what it was, a divestiture purely and simply. However it came about, it still was the divestiture prayed for in Counts I and III, see Appendix F, pp. 51a-56a, and argued for by the plaintiffs below. See Apendix G, p. 75a. Accordingly, because the district court exceeded its power in granting equitable relief to private plaintiffs in this case, it presents this

Court with an opportunity to address for the first time a significant question of federal law in a case in which a court of appeals is in conflict with two other circuits.

CONCLUSION

Wherefore, for all of the foregoing reasons, the Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

CIVIL ACTION NO. 89-787-A

PROFESSIONALS, INC., et al.,

Plaintiffs,

V.

JAGDISH P. BERRY, et al.,

Defendants.

MEMORANDUM OPINION

This action involves the purchase and development or sale of two parcels of land in Fairfax County, Virginia. The parcels are referred to as the Greenbrier property and Beulah Road property. The plaintiffs in this action are the corporations which held title to the two parcels and their shareholders.

The defendants are three individuals, Jagdish P. Berry, Virendra Berry and S. K. Berry, and two corporations with which the individuals are associated, Berry Associates and A.J., Inc. Counts I-VI of the Amended Complaint assert violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) by the individual defendants and the defendant corporations. Trebled damages and attorneys' fees are sought.

Also alleged in the Amended Complaint are pendent claims for Breach of Fiduciary Duty and Breach of Corporate Opportunity (Count VII), and common law fraud (Count VIII).

The defendants have filed a Counterclaim against the plaintiffs and others not named as plaintiffs (third-party claims), alleging violations of RICO (Count I), breach of fiduciary duty and fraud (Count II), fraud (Count III), and common law libel and slander (Count IV).

The case was tried to the court on October 30-November 1, 1989.

Plaintiffs' Claims

The plaintiffs have filed extensive proposed findings of fact. With changes, those findings are adopted as the court's own.

The court finds, as more specifically set forth in the attached findings, that the individual defendants, using the vehicle of the enterprise Greenbrier Corporation, embarked, in the development of that property, on a pattern of racketeering, including false invoices, forged checks, fictitious entities (Northern Virginia Construction, SBS Construction and General Construction Services), "flipping" the contract on Greenbrier Lot 9, cash disbursements ($23,000 without any supporting documents), and unauthorized and unrevealed loans, salaries and payments to the members of the Berry family for work not done and for which there is no supporting documentation, in order to drain off the profits of Greenbrier, and to present a picture of diminished profits to the stockholders. During and after this activity the defendants acted to cover up their activities by refusing the plaintiff-stockholders access to corporate books and records, altering the check register (which was the only source of financial information for the company's CPA), denying the stockholders information, filing lawsuits and suggesting that a witness lie. The plaintiffs were forced to go to the state court to secure access to the financial books and records. Even after issuance of an order for such access, the order had to be

enforced through issuance of a show cause order for contempt.

The RICO fraud was accomplished in part by the many letters and telephone calls between the individual defendants and the plaintiffs, clearly sufficient predicate acts for RICO. Moreover the racketeering activity was continuous, and there was clearly a relationship between the mailings and telephone calls and the fraud in that they were all designed to and did further the scheme and mislead the investors.

As to Greenbrier, it is no answer to say that if the plaintiffs would just wait until the County and State authorities release their completion bond, there will be a satisfactory disbursement. The moneys securing the letters of credit, which in turn secure the bonds, moneys which properly belong to the corporation, are in the name of Jagdish Berry. To rely upon him to turn that money over to the corporation when the bonds are released is unwarranted optimism.

As to the Beulah Road property there was not as much opportunity for fraud for no development was involved. The property was sold. It is clear, however, that the defendants' interest in that property, to the extent that interest exceeds the $55,000 originally contributed by Jagdish Berry, was acquired from proceeds of the unlawful racketeering activity engaged in with respect to Greenbrier. Moreover the defendant received a kickback of $15,000 from the subcontractor Judy (W.C. Construction) for work Judy had agreed to do on the Beulah property for S5,000. Of the $5,000, only $2,300 was paid.

As a result of a settlement of litigation in the Circuit Court of Fairfax County involving the Beulah Road property, 40% of the proceeds of the sale of that property is held in escrow pending further court order. That 40% was to cover the 30% of gross profit claimed by Berry Associates (later A.J., Inc.). The defendants are not entitled

to that 30%. It was a development fee. Although the sale of the Beulah Road property was not originally contemplated, the consideration for the 30% fee was the efforts and expertise of the Berrys in development of the property. Because that was never accomplished, the money belongs to the Beulah property venture.

This is not a close case. The excesses of the defendants are so blatant as to be crude, and their sanctimonious protests in testimony that they had the plaintiffs' best interest at heart are incredible, as are the glib explanations for the expenditures and disbursements.

What has been said concerning the RICO counts is also applicable to the pendent fraud and breach of fiduciary duty counts. Although the breach of fiduciary duty is primarily attributable to Jagdish Berry, he was certainly aided and abetted by his brothers. The damages attributable to these counts, however, are subsumed in the RICO damage awards.

Counterclaim

There was absolutely no evidence adduced on the counterclaim. Given the nature of the allegations in these claims, namely, fraud, embezzlement, libel, slander and implication of plaintiffs' counsel, it can only be viewed as a further attempt to intimidate the plaintiffs in order to discourage inquiry into the true nature of defendants' dealings. In the absence of any evidence to support the allegations, a Rule 11 inquiry is suggested. Because the RICO award is itself punitive, however, the court will not pursue this.

Conclusion

The court will enter an order:

1. As to the Greenbrier property, awarding judgment in favor of Professionals I, Inc., against the defendants in

the amount of $490,560.38, trebled to $1,471,681.10, plus costs including attorneys' fees. That damage award is calculated as follows:

a. The sum of $88,514.25 diverted from Greenbrier to the account of General Construction Services. (Plaintiffs' Exhibit Q-3).

b. The sum of $43,911.20 diverted from Greenbrier to the account of Northern Virginia Construction Services. (Plaintiffs' Exhibit Q-2).

c. The sum of $39,542.25 diverted to SBS Construction from Greenbrier (including forged checks). (Plaintiffs' Exhibit Q-1).

d. The sum of $153,155.10 diverted to Jagdish Berry from Professionals' Perpetual account. Plaintiffs' Exhibits G-14, G-16, M-1, M-4; Defendants' Exhibit F-17).

e. The sum of $28,600.00 diverted to Jagdish Berry due to the sale of the residence, Lot 9. (Plaintiffs' Exhibits D-37, G-9).

f. The sum of S12,000.00 representing the difference between $22,000.00 diverted to Virendra Berry by check dated November 1, 1988, and the amount of $10,000.00 which he repaid. (Plaintiffs' Exhibit C-14, testimony of Schmidt).

g. The sum of $10,966.78 diverted to A.J., Inc. (Plaintiffs' Exhibit C-12).

h. The sum of $23,009.03 representing checks payable to cash for which Jagdish Berry cannot provide adequate records to account. (Plaintiffs' Exhibit C-16).

i. The sum of $19,153.81 representing thirteen months of salary to Shoba Berry. (Plaintiffs' Exhibit C-15).

j. The sum of $53,227.72 representing twenty-six months of salary paid to Virendra Berry. (Plaintiffs' Exhibit C-14).

k. The sum of $7,650.00 representing checks payable to Tracy Triplett but deposited in defendants' accounts. (Plaintiffs' Exhibits H-2, H-4).

l. The sum of $4,135.00 representing check No. 1925 paid to SSM & Sons, an account of defendants. (Plaintiffs' Exhibit J-2.

m. The sum of $2,607.20 representing payment to Newton Paving for work done on the defendants' Maury Road house. (Plaintiffs' Exhibit J-5).

n. The sum of $4,088.04 representing the insurance proceeds from the damaged vehicle which was deposited in Jagdish Berry's account. (Plaintiffs' Exhibit E-67, Defendants' Exhibit F-17).

2. As to the Beulah Road property, awarding judgment in favor of Professionals, Inc., against the defendants in the amount of $12,700.00, trebled to $38,100.00, plus costs including attorneys' fees. That damage award represents the $15,000.00 kickback for $2,300.00 in payments for work to W. C. Construction. (Plaintiffs' Exhibits C-11, K-1, testimony of Judy).

3. Declaring that the defendants' interest in Professionals I, Inc., is limited to $50,000.00, and Professionals, Inc., to $55,000.00, and that the 30% fee is not owed Berry Associates or A.J. Inc.

4. Dismissing the claim of the individual plaintiffs.

5. Dismissing the counterclaims and third-party claims of the defendants.

6. Directing the counsel for the plaintiffs to submit their application for attorneys' fees and costs within ten days, and providing that within ten days thereafter the defendants may file any objections to the plaintiffs' application.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
November 24th, 1989

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 89-787-A

PROFESSIONALS, INC., et al.,

Plaintiffs,

V.

JAGDISH P. BERRY, et al.,

Defendants.

ORDER

For the reasons set forth in the Memorandum Opinion and the Findings of Fact this day filed, it is hereby ORDERED that:

1. Judgment is entered in favor of Professionals I, Inc., against Jagdish P. Berry, Virendra Berry, S. K. Berry, Berry Associates and A.J., Inc., jointly and severally, in the amount of $1,471,681.10

2. Judgment is entered in favor of Professionals, Inc., against Jagdish P. Berry, Virendra Berry, S. K. Berry, Berry Associates and A.J., Inc., jointly and severally, in the amount of $38,100.00.

3. The defendants' interest in Professionals I, Inc., is declared to be limited to $50,000.00, and in Professionals, Inc., to $55,000.00, and that the 30% fee is declared not to be owed Berry Associates or A.J., Inc.

4. The claim of the individual plaintiffs is dismissed.

5. The counterclaims and third-party claims of the defendants are dismissed.

6. Counsel for the plaintiffs shall submit its application for attorney's fees and costs within ten days, and within ten days thereafter the defendants shall file any objections to the application. The court will rule on the application without further oral argument.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
November 24th, 1989

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 90-3005

PROFESSIONALS, INC.; PROFESSIONALS I, INC.,
Plaintiffs - Appellees,

and

MAGNO P. ROQUE; ARVIND K. PATHAK,
Plaintiffs,

versus

JAGDISH P. BERRY; VIRENDRA BERRY; SURENDRA K. BERRY; BERRY ASSOCIATES, INC.; A. J. INC.,
Defendants & Third Party Plaintiffs - Appellants,

versus

SOHAIL AHMAD; JOHN E. GARLITZ; AKHIL K. GOVIL; VIJAY KUMAR; BALJEET S. MAHAL; P. P. MEHROTRA; S. L. SANDHIR; HARJIT S. SIDHU; QUMAR UL ZAMAN; MOHAMMED IDRESS; SAMUEL N. NAVA; ROMULO VILLANUEVA; WILLIAM P. DALE,
Third Party Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. (CA-89-787-A)

Argued: December 3, 1990

Decided: January 25 1991

Before ERVIN, Chief Judge, CHAPMAN, Circuit Judge, and NORTON, United States District Judge for the District of South Carolina, sitting by designation.

Remanded with instructions by unpublished per curiam opinion.

ARGUED: Frank Willard Dunham, Jr., COHEN, GETTINGS, ALPER & DUNHAM, Arlington, Virginia, for Appellants. William Parry Dale, MCCHESNEY, DUNCAN & DALE, P.C., Washington, D.C., for Appellees. ON BRIEF: Brian P. Gettings, John E. Gagliano, COHEN, GETTINGS, ALPER & DUNHAM, Arlington, Virginia, for Appellants. Mark W. Borghesani, Hanno I. Rittner, MCCHESNEY, DUNCAN & DALE, P.C., Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Plaintiffs Professionals, Inc. and Professionals I, Inc. sued three individual defendants alleging violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, and asserting state law claims of fraud, breach of fiduciary duty, and breach

of corporate opportunity. The district court found in favor of the plaintiffs on the RICO cause of action and awarded treble damages.* Defendants appeal claiming that the district court erred in finding RICO violations because there was no "pattern of racketeering activity." We hold that the district court's failure to make specific findings prevents an adequate review and therefore remand for proceedings consistent with this opinion.

Plaintiffs brought this action on May 23, 1989 in the United States District Court for the Eastern District of Virginia pursuant to the Racketeer Influenced Corrupt Organizations Act. Plaintiffs alleged that the individual defendants, Jagdish P. Berry, Virendra Berry, and S. K. Berry conducted the affairs of Professionals, Inc. through a "pattern of racketeering activity." Plaintiffs charged that corporate funds were diverted to the Berrys by various illegitimate means including payments to fictitious subcontractors created by them, payment of unauthorized salaries to family members, and unauthorized transfers of funds to bank accounts which they controlled. Plaintiffs sought treble damages and attorneys' fees. The defendants filed a counterclaim against the plaintiffs and numerous third-party claims alleging violations of RICO, breach of fiduciary duty, fraud, and common law libel and slander.

On November 24, 1989, after conducting a bench trial, the district court found that the defendants had conducted the affairs of the plaintiff corporations through a "pattern of racketeering." Pursuant to RICO's treble damages provision, 18 U.S.C. 1964(c), damages were awarded to Professionals I, Inc. in the amount of $1,471,681.10 and

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* With regard to the pendent state claims, the district court ruled that "[w]hat has been said concerning the RICO counts is also applicable to the pendent fraud and breach of fiduciary duty counts .... The damages attributable to these counts, however, are subsumed in the RICO damage award." On the present record, the disposition of plaintiffs' breach of corporate opportunity claim is unclear.

to Professionals, Inc. in the amount of $38,100.00. The court dismissed the defendants' counterclaim and third party claims.

Defendants raised several issues on appeal including whether the district court erred in finding that a pattern of racketeering activity existed.

I.

In order to prevail in a civil RICO action, a plaintiff must prove that defendant has violated the substantive RICO statute, 18 U.S.C. 1962 (1988), commonly known as "criminal RICO." In so doing, he must prove six constituent elements: (1) that a "person" (2) through a "pattern of racketeering activity" (3) directly or indirectly invests in, or maintains an interest in, or participates in (4) an "enterprise," (5) the activities of which affect interstate or foreign commerce, and (6) that he was injured by reason of this activity. 18 U.S.C.§§ 1962(a)-(c), 1964(c). According to section 1961(5), the term "pattern of racketeering activity" requires at least two acts of "racketeering activity" committed within ten years of each other, one of which occurred since the enactment of the statute. "Racketeering-activity" is defined in section 1961(1) as any act which involves certain enumerated state felonies and acts indictable under certain enumerated federal statutes. This court has previously stated that the "pattern" requirement is "more than incidental to the operation of the RICO statute." *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 683 (4th Cir. 1989). The pattern requirement acts to "ensure that RICO's extraordinary remedy does not threaten the ordinary run of commercial transactions; that treble damage suits are not brought against isolated offenders for their harassment and settlement value; and that the multiple state and federal laws bearing on transactions . . . are not eclipsed or preempted." *Id.* As the Seventh Circuit stated in *Lipin Enterprises Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986), "[t]he pattern requirement was intended

to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who regularly commits such crimes. ABA Section of Corporation, Banking & Business Law, *Re*ort of the Ad Hoc *Civil RICO Task Force*, 203-08 (1985)."

> [W]e have deliberately declined to adopt any mechanical rules to determine the existence of a RICO pattern, holding instead that the issue is a matter of criminal dimension and degree to be decided on a case-by-case basis. Factors relevant to this inquiry include the number and variety of predicate acts and the length of time over which they were committed, the number of putative victims, the presence of separate schemes, and the potential for multiple distinct injuries. These factors are not exclusive, and no one of them is necessarily determinative; instead, a carefully considered judgment taking into account all the facts and circumstances of the particular case—with special attention to the context in which the predicate acts occur—is required.

Parcoil Corp. v. Nowsco Well Service, Ltd., 887 F.2d 502, 504 (4th Cir. 1989) (quoting *Brandenburg v. Seidel*, 859 F.2d 1179, 1185 (4th Cir. 1988)).

In its opinion, the district court adopted with minor changes plaintiffs' proposed findings of fact and summarily concluded that defendants' conduct constituted a RICO pattern. The district court, however, did not make specific findings as to what conduct by the defendants constituted "racketeering activity" pursuant to section 1961(1). It ignored the comprehensive provisions of section 1961(1) which alone enumerates all conduct which may constitute "racketeering activity." On the present record, it is impossible for this court to determine what conduct of the defendants the district court found to be "racketeering activity." With regard to whether a "*pattern* of racket-

eering activity" existed, the record is similarly devoid of specific findings as to the time period over which the racketeering activity took place. At no point did the district court make specific findings as to when the acts of "racketeering activity" began, when they ended, or whether they caused plaintiffs' injuries. While we certainly sympathize with the case load of the district court and the many demands upon its time, we cannot adequately review the district court's determination that a "pattern of racketeering activity" existed without more "racketeering activity" they were committed, and specific findings on what acts of occurred, the length of time over which whether they caused plaintiffs' injuries.

II.

For the foregoing reasons, we remand this case to the district court for proceedings consistent with this opinion.

REMANDED WITH INSTRUCTIONS

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

CIVIL ACTION NO. 89-787-A

PROFESSIONALS, INC., et al.,

Plaintiffs,

v.

JAGDISH P. BERRY, et al.,

Defendants.

MEMORANDUM OPINION AND FINDINGS

Upon receipt of the mandate from the United States Court of Appeals, the court directed the parties to submit proposed findings of fact addressing those matters raised in the opinion of the Court of Appeals. The plaintiffs have submitted their proposed findings, the defendants have submitted their objections to the plaintiffs' proposed findings and findings of their own, and the plaintiffs have replied to the defendants' submission.

The defendants seek to raise matters which in the court's view have already been disposed of in this court's November 24, 1990 Memorandum Opinion, and matters which go beyond what the court understands to be the instructions from the Court of Appeals on remand. Such matters as whether this case involves fraud in the investment inducement, whether this court has mistakenly interposed the obligations owed the plaintiff corporations, and whether the damage sustained is to the corporations or the individual investors were issues decided in this court's earlier opinion. In any event, whether this court was correct or

not, they will not be revisited at this level, and this court does not understand the instructions from the Court of Appeals to require this court to revisit them.

Obedient to the remand and instructions of the United States Court of Appeals in its January 25, 1991 decision, this court makes the following specific findings:

1. The acts of racketeering which occurred and which are a violation of 18 U.S.C. § 1341 (relating to mail fraud) are as follows:

Exhibit No.	Date	Description
E-6	11/29/85	Beulah letter from M. Berry, re contributions
E-7	2/22/87	Beulah letter from J. Berry, re contributions
E-8	3/20/87	J. Berry letter on both projects "to make everyone feel sound and secure"
E-9	3/20/87	Beulah letter from J. Berry, re contributions
E-10	6/15/87	Beulah letter from J. Berry, re contributions
E-11	9/8/87	Beulah letter from J. Berry, re contributions
E-12	9/14/87	Greenbrier letter from J. Berry designed to make investors feel secure
E-13	22/3/87	Beulah letter re default on one investor
E-15	11/9/87	Beulah notice of annual meeting
E-16	11/16/87	Beulah letter from J. Berry, re contributions
E-19	12/2/87	Beulah notice of meeting
E-21	12/15/87	Greenbrier notice of meeting
E-27	1/16/88	Beulah correspondence as to status
E-28	1/16/88	Beulah correspondence as to status

E-31	2/8/88	Greenbrier letter from J. Berry setting forth false profit information
E-32	3/3/88	Beulah letter from J. Berry setting forth false proof of information
E-33	3/6/88	Beulah letter from J. Berry, re contributions
E-34	4/11/88	Beulah notice of meeting to sell property
E-38	6/3/88	Beulah letter from J. Berry, re contributions
E-39	6/3/88	Beulah letter from J. Berry, re contributions
E-40	6/20/88	Beulah letter from J. Berry, re contributions
E-47	9/4/88	Beulah letter from J. Berry, re contributions
E-62	3/3/89	Greenbrier notice of meeting of 3/12/89
E-63	3/3/89	Beulah notice of meeting of 3/12/89
E-64	3/3/89	Both corporations letters from J. Berry urging use of prior corporate accountant
F-1	5/26/88	Beulah letter from Mr. McGinnis to Dr. Roque
F-16	12/16/88	Greenbrier letter frm Mr. McGinnis to Mr. Dale

2. Each of the foregoing mailings was mailed with the intent to carry out some essential step in the execution of the "scheme to defraud" found by the court in its November 24, 1990 Memorandum Opinion. Many of the letters themselves do not disclose on their face that they were mailed in furtherance of the scheme to defraud; however, this is not necessary if they were in furtherance of the scheme, which they were. Each separate mailing is a separate offense under 18 U.S.C. § 1341.

The seeking of contributions, holding of meetings, (false) advice as to the status of the corporations, and assurances of security were all in furtherance of the basic scheme. Each of the mailings constitute an act of "racketeering activity" as defined in 18 U.S.C. § 1961(1), and together they constitute more than the two such acts required for a "pattern of racketeering" under 18 U.S.C. § 1961(5). Moreover, these letters, as well as the telephone calls discussed later, were part of a continuous pattern which continued, right up to the time the Berrys were removed as officers of Beulah Corporation on October 9, 1988, and of the Greenbrier Corporation on December 11, 1988, furthering the goals of the scheme while attempting to forestall investigations by the plaintiff. This scheme and these acts caused and were designed to cause the damages sustained by the plaintiffs. They permitted the Berrys to obtain the assets of the plaintiffs, retain them, and forestall the plaintiffs' investigations by false assertions and threats.

As indicated, the acts were all related to the common scheme, and they continued until the Berrys were removed and even beyond. This action was filed on May 23, 1989. Had the fraud not been uncovered and laboriously pursued, there is no question that there would have been continuing criminal activity.

The court finds the following instances of wire fraud in violation of 18 U.S.C. § 1343:

1. A July 22, 1988 telephone call from Jagdish Berry to Dr. Pathak, attempting to persuade Pathak into disagreeing with other shareholders to sell the Beulah property.

2. A telephone call to witness Ron Chilton from Surandra Berry, after this action had been filed and a few months prior to trial, directing him not to get involved. Chilton is the person referred to in the court's Finding of Fact No. 68.

3. Calls to Pathak in Cumberland, Maryland, from Berry's Virginia telephone on the following dates in 1985: April 27, 29; May 24, 28; June 4, 7, 10, 14, 15, 18, 22, 24; July 6, 11, 22, 24; August 19, 22 (twice), 24, 31; September 11, 12; and November 8, 9, 16 and 23 (Defendants' Ex. A-10).

Dr. Pathak testified that each of these calls had to do with Berrys' efforts to induce him and his friends to invest in the projects. He had no other relationship with the Berrys during this period of time.

4. A June 22, 1985 call and an August 21, 1985 call from the Virginia telephone of the Berrys to Dr. Sibander Sandhir's number in Cumblerland, Maryland.

The foregoing, particularly the telephone calls enumerated in Paragraphs 1, 2 and 4, are telephone calls made with the intent to carry out some essential step in the execution of the scheme to defraud. As with the mail fraud, each separate telephone call is a separate offense under 18 U.S.C. § 1341. With the mailings, these calls were the proximate cause of the damages sustained by the plaintiffs.

The plaintiffs in their Supplemental Prosed Findings of Fact assert additional acts of racketeering activity in the form of violations of 18 U.S.C. 1503 (obstruction of justice) and transportation in interstate commerce of stolen property in violation of 18 U.S.C. 2314. While perhaps there is some basis for such a finding, these were not the predicate acts on which the court relied in the court's Memorandum Opinion of November 24, 1989.

* * *

The foregoing constitutes this court's "more specific findings on what acts of 'racketeering activity' occurred, the length of time over which they were committed, and whether they caused plaintiffs' injuries" as instructed by the remand of the Court of Appeals.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
March 25th, 1991

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 89-787-A

PROFESSIONALS, INC., et al.,

Plaintiffs,

JAGDISH P. BERRY, et al.,

Defendants.

ORDER

For the reasons set forth in the Memorandum Opinion this day filed, it is

ORDERED that the judgments of November 24, 1989 and December 27, 1989, which are hereby confirmed (and which have not been vacated) are supported by the Findings of Fact this day filed, as well as the Findings of Fact filed on November 24, 1989 and December 27, 1989.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
March 25th, 1991

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91-1509

PROFESSIONALS, INC.; PROFESSIONALS I, INC.,
Plaintiffs-Appellees,

and

MAGNO P. ROQUE; ARVIND K. PATHAK,
Plaintiffs,

v.

JAGDISH P. BERRY; VIRENDRA BARRY; SURENDRA K. BERRY; BERRY ASSOCIATES, INC.; A.J. INC.,
Defendants & Third Party Plaintiffs-Appellants,

v.

SOHAIL AHMAD; JOIIN E. GARLITZ; AKHIL K. GOVIL; VIJAY KUMAR; BAIJEET S. MAHAL; P. P. MEHROTRA; S. L. SANDHIR; HARJIT S. SIDHU; QUMAR UL ZAMAN; MOHAMMED IDRESS; SAMUEL N. NAVA; ROMULO VILLANUEVA; WILLIAM P. DALE,
Third Party Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-89-787-A)

Argued: October 30, 1991

Decided: April 2, 1992

Before ERVIN, Chief Judge, WILKINS, Circuit Judge, and CHAPMAN, Senior Circuit Judge.

Affirmed by unpublished opinion. Judge Wilkins wrote the opinion, in which Chief Judge Ervin and Senior Judge Chapman joined.

COUNSEL

ARGUED: Frank W. Dunham, Jr., COHEN, GETTINGS & DUNHAM, Arlington, Virginia, for Appellants. William Parry Dale, MCCHESNEY, DUNCAN & DALE, P.C., Washington, D.C., for Appellees. ON BRIEF: Brian P. Gettings, John E. Gagliano, COHEN, GETIINGS & DUNHAM, Arlington, Virginia, for Appellants. Charles F. Fuller, Hanno I. Rittner, MCCHESNEY, DUNCAN & DALE, P.C., Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

WILKINS, Circuit Judge:

Professionals, Inc. and Professionals I, Inc. (collectively, "Professionals") brought suit against Jagdish P. Berry, Virendra Berry, Surendra K. Berry (collectively, "the Berrys"), Berry Associates, Inc., and AJ. Inc. (collectively, "Berry Associates") alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. §§ 1962(a)-(d), 1964(a), (c) (West 1984 & Supp. 1991), and state law claims of fraud, breach of fiduciary duty, and misappropriation of corporate opportunity. The district court awarded treble damages, attorneys' fees, and costs in favor of Professionals. The Berrys and Berry Associates contend that the district court erred in finding that they operated through a pattern of racketeering activity and that the pattern proximately caused the injury sustained by Professionals. Additionally, the Berrys and Berry Associates challenge the dismissal by the district court of their counterclaim for return of capital contributions and earnings and payment of a development fee. We affirm.

I.

The Berrys owned and operated Berry Associates, a real estate development firm in Northern Virginia. In early 1985, the Berrys began to solicit capital contributions from investors in Virginia and Maryland to finance the purchase of two parcels of land. In early 1986, the Berrys and the investors purchased two properties, Beulah Road at a cost of $820,000 and Greenbrier at a cost of $432,000, and titled them in the plaintiff corporations. After Jagdish Berry was elected president of Professionals, it contracted with Berry Associates to develop the sites in exchange for 30 percent of the profits realized from eventual sales.

Over a three-year period, the Berrys and Berry Associates diverted approximately $500,000 from Professionals through various means. These included causing Professionals to pay salaries to Berry family members, some of whom performed no services. By purchasing and reselling

a Greenbrier lot on the same day, the Berrys diverted a profit of $28,600 from Professionals. They wrote checks to themselves, other family members, and Berry Associates totalling approximately $60,000 purportedly to cover services rendered for Professionals, yet they were unable to substantiate the expenditures. Without authorization, they borrowed money from Professionals and, although the loan was not repaid, directed its accountant to prepare financial reports indicating that the debt had been satisfied. False check register entries made by the Berrys, on which the accountant relied, further skewed the reports. Communicating by wire and mail, the Berrys continuously provided the shareholders with false or misleading reports of the financial condition of Professionals.

During 1986 and 1987, the Berrys opened corporate bank accounts for three construction companies that did not maintain business records or pay taxes and were not registered as required by Virginia law. These corporations presented falsified invoices in excess of $325,000 that were paid from funds of Professionals.

Alarmed by their inability to obtain complete and detailed financial information and because of other problems plaguing the development of Beulah Road, Professionals' shareholders began to question the management and operation of Berry Associates. In an effort to minimize their losses, Professionals voted to sell Beulah Road and contracted with a buyer. The Berrys attempted to block this sale by filing suit in state court. Subsequent litigation resulted in consent decrees directing the Berrys to conduct a shareholders' meeting, prohibiting the Berrys from transferring assets of Professionals, and allowing the shareholders of Professionals access to corporate documents. By the end of 1988, Professionals removed Jagdish Berry from his position as president.

Professionals then filed the instant suit alleging violations of RICO by the Berrys and Berry Associates. Profes-

sionals also brought state law claims of fraud, misappropriation of corporate opportunity, and breach of fiduciary duty. The Berrys and Berry Associates counterclaimed, averring RICO and state law violations by Professionals and their counsel. They also asserted entitlement to the 30 percent development fee for the sale of the Beulah Road property, reimbursement for capital contributions, and payment of investment returns allegedly earned on both properties.

Following a bench trial, the district court found in favor of Professionals on the RICO and pendent state claims. The court awarded $1,509,781 in treble damages on the RICO violations; these awards subsumed the damages attributable to the state law violations. The court rejected the demand of the Berrys and Berry Associates for the 30 percent development fee and for earnings on their invested funds and instead found that they were entitled to the amount they contributed to the properties, $105,000. The court subsequently awarded costs and attorneys' fees to Professionals.

Contending that their actions did not give rise to a RICO violation, the Berrys and Berry Associates appealed. This Court remanded for "more specific findings on what acts of 'racketeering activity' occurred, the length of time over which they were committed, and whether they caused plaintiffs' injuries." Professionals, Inc. v. Berry, No. 90-3005, slip op. at 7 (4th Cir. Jan. 25, 1991) (per curiam). On March 25, 1991, the district court issued additional findings. The Berrys and Berry Associates appeal from this order.[1]

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[1] For ease of reference, we refer to the individual defendants and Berry Associates as "the Berrys" throughout the remainder of this opinion.

II.

A.

The district court identified 58 predicate acts committed by the Berrys that it found constituted a pattern of racketeering activity, see 18 U.S.C.A. § 1962(c).[2] The Berrys contend that the district court concluded that a pattern existed simply on the basis of the number of predicates identified. Moreover, they argue that the acts lack sufficient continuity and relatedness to constitute a pattern. We disagree.

To prove a pattern of racketeering activity, a plaintiff "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Relatedness embraces criminal acts that "have 'the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" *Hindes v. Castle*, 937 F.2d 868, 872 (3d Cir. 1991) (quoting *HJ. Inc.*, 492 U.S. at 240). Continuity "refer[s] either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H.J. Inc.*, 492 U.S. at 241. To determine whether the continuity prong has been satisfied, we evaluate "'the number and variety of predicate acts and the length of time over which they were committed, the number of putative victims, the presence of separate schemes, and the potential for multiple distinct injuries.'" *Parcoil Corp. v. NOWSCO Well Serv., Ltd.*, 887 F.2d 502, 504 (4th Cir. 1989) (quoting Brandenburg v.

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[2] We, note that the district court did not address, nor did the parties raise on appeal, the issue of whether the "enterprise" requirement of RICO was satisfied. See 18 U.S.C.A. 1961(4) (West 1984). Because the Berrys have not raised this issue, we assume without that this requirement has been met.

Seidel, 859 F.2d 1179, 1185 (4th Cir. 1988)). While we examine each of these factors, "no one [factor] is necessarily determinative"; rather, we undertake "a carefully considered judgment taking into account all the facts and circumstances of the particular case." *Brandenburg*, 859 F.2d at 1185.

Our review reveals that Professionals has proven the relatedness prong of the pattern requirement. The common participants, the three Berry brothers and Berry Associates, devised a plan in which they committed misconduct consisting primarily of repeated use of the mails and wires. These acts included solicitation of initial and multiple subsequent fiscal contributions, preparation and furnishing of false and misleading financial reports, and participation in shareholders' meetings during which the Berrys disseminated false and misleading reports on the progress of the sites. The Berrys intended that these acts achieve a common purpose: to obtain, use, and ultimately deplete the assets of Professionals. Each predicate act advanced the scheme as each incrementally facilitated the flow of money between the corporations and induced the shareholders to rely on the Berrys.

Likewise, sufficient continuity exists among the predicate acts to meet the second prong of the pattern requirement. The 58 acts occurred over a three-year period, victimized 16 investors, and involved three individual perpetrators acting in concert. The acts encompassed a variety of techniques to deplete corporate assets and support the Berrys method of operating the corporation, including falsified invoices and creation of fictitious subcontractors. These activities present a sharp contrast to other instances in which we have declined to find a pattern of racketeering activity. In *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989), we held that allegations failed to satisfy the continuity prong of a RICO pattern because one perpetrator undertook actions directed toward a single fraudulent goal that impacted two investors over a period

of approximately one year. Likewise, in *Parcoil*, we declined to find a RICO pattern when 17 falsified reports were sent to a single victim over a four-month period. *See Parcoil*, 887 F.2d at 504.

In addition to the difference in numbers of victims, predicate acts, and duration, the scheme perpetrated by the Berrys presented a threat of ongoing criminal activity unlike the discrete schemes perpetrated in other cases. We have rejected RICO pattern claims when plaintiffs have failed to show with specificity the existence of a distinct threat of continuing racketeering activity. *See Menasco*, 886 F.2d at 684. In *Parcoil*, the defendants ceased their criminal activity independently of its discovery and the plaintiff offered no evidence that the activity constituted the defendants' "regular way of doing business." *Parcoil*, 887 F.2d at 504. The Berrys, however, endeavored to prolong the scheme and avoid detection by presenting a continuing flow of falsified profit reports to the shareholders, attempting to block the sale of Beulah Road, and encouraging reconciliation after state court litigation had begun by making false statements and promises. Even as litigation ensued, the Berrys violated consent orders issued by the state court. As the district court observed, had Professionals not uncovered and laboriously pursued exposure of these illegitimate practices, the Berrys likely would have persevered in their efforts to bilk Professionals of all of its earnings and investments. Because of the scope and ongoing nature of the activities, the Berrys' behavior presents the type of "'ongoing criminal activity of sufficient scope and persistence to pose a special threat to social well-being,'" Brandenburg, 859 F.2d at 1185 (quoting *Walk v. Baltimore & Ohio R.R.*, 847 F.2d 1100, 1106 (4th Cir. 1988), *vacated on other grounds*, 492 U.S. 914 (1989)).

B.

The Berrys contend that the district court erred in finding that the predicate acts permitted the Berrys to obtain the assets of the plaintiffs, retain them, and forestall the plaintiffs' investigations by false assertions and threats. They attack this finding as insufficient to support causation for a RICO violation, arguing that at best the predicate acts gave rise to only a state law violation. Moreover, they maintain that Professionals failed to prove their detrimental reliance on the predicate acts, a prerequisite to recovery under RICO.

Evaluation of the RICO causation requirement includes consideration of "such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection." *Id.* at 1189. The Berrys orchestrated and undertook predicate acts to deplete Professionals of its assets. They provided false information regarding the nature, stability, and productivity of the investments, paid salaries to family members that did notperform services, wrote checks to themselves even though they rendered no compensable services to Professionals, clandestinely borrowed funds and never repaid the debts, directed production of false and misleading financial reports, and created fictitious construction companies through which the Berrys processed falsified invoices. These actions lulled investors into a false sense of security, allowed the Berrys to avoid payment of dividends and returns, and permitted the Berrys to divert the investigation.

We recognized the necessity of establishing detrimental reliance to prove an injury to business or property under RICO in *Morley v. Cohen*, 888 F.2d 1006, 1011 (4th Cir. 1989). The Berrys sought and obtained reliance on their actions by Professionals. Jagdish Berry portrayed himself, his family, and Berry Associates as experienced real estate developers who had achieved success with past projects,

and he represented to Professionals that these skills would be beneficial to the development of Beulah Road and Greenbrier. Indeed, like the plaintiff in *Morley*, the shareholders would not have made an initial investment with the Berrys, purchased a second property, or continued their association with the Berrys if they had known of the Berrys' illegitimate practices. We conclude that the district court did not err in holding that the predicate acts caused the injury sustained by Professionals.

C.

In their counterclaim, the Berrys alleged RICO and state law violations and sought various remedies including payment of the 30 percent development fee for the sale of the Beulah Road property. In addition to the return of their capital contributions, the Berrys also demanded that Professionals return approximately $1,500,000 allegedly invested in or earned through the development of the properties. The district court correctly dismissed the counterclaim, finding that the development fee was not owed to the Berrys and determining that the Berrys' interest in the properties was $105,000 the amount they originally invested. Raising the novel argument that dismissal of their counterclaim amounted to a grant of equitable relief to Professionals, the Berrys challenge the order of dismissal as beyond the power of the court. We find this argument to be without merit. The district court simply denied the Berrys the relief they requested.

III.

The Berrys raise additional issues, including claims that RICO is void because it is unconstitutionally vague and that the district court erred in its computation of damages and by amending the pleadings sua sponte. We have carefully reviewed these contentions and find them to be without merit. Accordingly, the order of the district court is affirmed.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 89-787-A

PROFESSIONALS, INC., et al.,

Plaintiffs,

v.

JAGDISH P. BERRY, et al.,

Defendants.

ORDER

For the reasons stated from the bench, it is hereby ORDERED that:

1. Except to the extent that the counterclaim seeks a recovery against the corporate plaintiffs, Professionals, Inc., and Professionals I, Inc., in the RICO counts, the motions of the plaintiffs-counter defendants and third-party defendants to dismiss the counterclaim are denied. The RICO claims in the counterclaim against the said corporations are dismissed because the court construes the counterclaim as asserting in the RICO claims that those corporations are the enterprise.

2. The motion of the defendants for summary judgment is denied.

3. The motion of the plaintiffs and third-party defendants to sever the counterclaim and the third-party actions is denied.

4. The motion of the defendants for a continuance is denied.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
October 13th, 1989

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1509

PROFESSIONALS, INC.; PROFESSIONALS I, INC.
Plaintiffs - Appellees

and

MAGNO P. ROQUE; ARVIND K. PATHAK
Plaintiffs

v.

JAGDISH P. BERRY; VIRENDRA BERRY; SURENDRA K. BERRY; BERRY ASSOCIATES, INC.; A. J. INC.
Defendant & Third Party Plaintiff - Appellants

v.

SOHAIL AHMAD; JOHN E. GARLITZ; AKHIL K. GCVIL; VIJAY KUMAR; BALJEET S. MAHAL; P. P. MEHROTRA; S. L. SANDHIR; HARJIT S. SIDHU; QUMAR UL ZAMAN; MOHAMMED IDRESS; SAMUEL N. NAVA; ROMULO VIHANUEVA; WILLIAM P. DALE
Third Party Defendants

ORDER

Appellants have filed a petition for rehearing.

The Court denies the petition for rehearing.

Entered at the direction of Judge Chapman, with the concurrence of Chief Judge Ervin and Judge Wilkins.

/s/ Bert Montague
ACTING CLERK

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

(Alexandria Division)

Civil Action No. 89-787-A

PROFESSIONALS, INC.
A Virginia Corporation
12801 Mitchell Court
Fairfax, Virginia 22033

and

PROFESSIONALS I, INC.
A Virginia Corporation
12801 Mitchell Court
Fairfax, Virginia 22033

and

MAGNO P. ROQUE
924 Seton Drive
Cumberland, Maryland 21502
Individually and on behalf of all shareholders of Profews-sionals, Inc./Professionals I, Inc.

and

ARVIND K. PATHAK
12801 Mitchell Court
Fairfax, Virginia 22033
Individually and on behalf of all shareholders of Profes-sionals, Inc./Professionals I, Inc.

Plaintiffs

v.

JAGDISH P. BERRY

9727 Maury Road
Fairfax, Virginia 22032

and

VIRENDRA BERRY
9727 Maury Road
Fairfax, Virginia 22032

and

SURENDRA K. BERRY
9727 Maury Road
Fairfax, Virginia 22032

and

BERRY ASSOCIATES, INC.
A Virginia Corporation
Serve:
Jagdish Berry,–Preisdent
9727 Maury Road
Fairfax, Virginia 22032

and

A.J., INC.
A Virginia Corporation
Serve:
Jagdish Berry, President
9727 Maury Road
Fairfax, Virginia 22032

Defendants

AMENDED COMPLAINT

COME NOW the Plaintiffs, by counsel, and file this Complaint against the Defendants on the grounds and in the amounts as hereinafter set forth, and in support thereof states as follows:

PARTIES

1. Plaintiff, Professionals, Inc., a Virginia Stock Corporation conducting business in the Commonwealth of Virginia, was formed and operated to develop residential real estate for resale in the Commonwealth of Virginia.

2. Plaintiff, Professionals I, Inc., a Virginia Stock Corporation conducting business in the Commonwealth of Virginia, was formed and operated to develop residential real estate for resale in the Commonwealth of Virginia.

3. Plaintiff, Magno P. Roque, M.D., a domiciliary and resident of the state of Maryland, is a director and a shareholder in Professionals, Inc. and Professionals I, Inc.

4. Plaintiff, Arvind K. Pathak, M.D., a resident of the Commonwealth of Virginia, is president of and a shareholder in Professionals, Inc., and Professionals I, Inc.

5. Plaintiffs, Magno P. Roque, M.D., and Arvind K. Pathak, M.D., bring this action in their individual capacity and as representatives of the class of shareholders of Professionals, Inc. and Professionals I, Inc.

6. Defendants, Jagdish P. Berry, Virendra Berry and Surendra K. Berry, are brothers and are residents of the Commonwealth of Virginia.

7. Defendant, Berry Associates, Inc., is a Virginia corporation conducting business in the Commonwealth of Virginia.

8. Defendant, A.J., Inc., is a Virginia corporation conducting business in the Commonwealth of Virginia.

JURISDICTION AND VENUE

9. This Court has original jurisdiction to hear this Complaint and to adjudicate the claims stated herein under 18 U.S.C. Section 1964(c), inasmuch as this action is being brouoght under the Racketeer Influenced and Corrupt Or-

ganizations Act ("RICO"), 18 U.S.C. Section 1961 *et seq.* Plaintiffs also assert state law claims for fraud, breach of fiduciary duty, and breach of corporate opportunity for which jurisdiction is based on the doctrine of pendant jurisdiction.

10. Venue is proper in the Eastern District of Virginia, Alexandria Division, pursuant to 18 U.S.C. Section 1965, inasmuch the unlawful activity hereinafter described was committed and/or originated in Fairfax County, Virginia.

FACTS

11. Plaintiffs, Professionals, Inc., and Professionals I, Inc., were formed in August 1985 and October 1986, respectively, to purchase raw land and ultimately either resell the land or develop it into residential homes for sale. Although the shareholders of Professionals, Inc. and Professionals I, Inc. are not identical, a significant number of individuals are shareholders in both corporations.

12. Up until late 1988, Defendant, Jagdish P. Berry, served as the presideqnt and sole director of both corporations. During this time period, he confused the identity of the separate corporations with regard to the projects they undertook, to wit: Professionals, Inc., for accounting and tax purposes, was the corporation which developed 16 residential homes in the Gene P. Mitchell subdivision in Fairfax County, Virginia. That corporation is sometimes referred to in the books and records of the corporation as "Professionals I, Inc." In order to avoid further confusion, that corporation will be referred to as "The Greenbrier Corporation" in this Complaint. Professionals I, Inc., for accounting and tax purposes, was the corporation which purchased and resold 17 acres of real property in and around Beulah Road, Alexandria, Fairfax County, Virginia. That corporation is sometimes referred to in the books and records of the corporation as "Professionals, Inc." In

order to avoid further confusion, that corporation is referred to as "The Beulah Corporation" in this Complaint.

13. Since on or about September 1, 1985, Defendants, Jagdish P. Berry, Virendra Berry, Surendra K. Berry, Berry Associates, Inc., and A.J., Inc., acting together and in association with each other, together with Shoba Berry and Windsor Hill Corporation devised a plan or scheme to defraud the shareholders of Professionals, Inc. and Professionals I, Inc. in which they used, among other things, to carry out their plan, certain fictitious corporate or business entities, which in reality were the alter ego of one or more of the individual Defendants named herein, to wit: General Construction Services, Northern Virginia Construction, and S.B.S. Construction. The plan and scheme continues to the present time.

14. In late 1985, Defendants, Jagdish P. Berry Virendra Berry and Surendra K. Berry, devised a plan or scheme whereby they sought to induce Plaintiffs, Magno P. Roque and Arvind K. Pathak, and the class of shareholders they represent to purchase stock in The Greenbrier Corporation by falsely and fraudulently representing that their companies, Defendants, Berry Associates, Inc. and A.J., Inc., would develop the real property purchased by the corporation. In exchange, Defendants, Berry Associates, Inc. and A.J., Inc. would receive a development fee equal to 30 percent of the net profits of the corporation for developing and selling the real estate and the shareholders would inure significant profits.

15. The aforesaid representations were false when made because the Defendants, Jagdish P. Berry, Virendra Berry and Surendra K. Berry, intended to fraudulently and surreptitiously embezzle and divert a substantial portion of the profits of the corporation to themselves and to return to the shareholders only small portion of the profits on the project. On previous occasions Defendants have undertaken residential real estate projects and have under-

taken activity designed to defraud the individuals with whom they were dealing.

16. In Furtherance of that plan or scheme, Defendants, Jagdish P. Berry, Virendra Berry and Surendra K. Berry, encouraged several out-of-state investors, including, but not limited to, Plaintiff Magno P. Roque, to contribute substantial sums of money for corporate stock of The Greenbrier Corporation to develop the Greenbrier project by mailing and causing to be mailed solicitations for initial contributions to the shareholders. In connection with this solicitation, Defendants made use of the United States mails to send a document on or about March 4. 1986, to the shareholders discussing the terms of the investments. On or about April 10, 1986, Defendants caused to be mailed a notice of meeting of the investors to discuss, *inter alia* projected profit. On or about April 18, 1986, defendant Jagdish Berry made use of the United States mails to send to the investors minutes of meeting of investors regarding the status of the investments. These mailings were made in order to implement and further Defendants' scheme to embezzle funds from the corporation and defraud the corporation and its shareholders of assets. On March 20, 1987, defendant Jagdish Berry made use of the United States mails in order to further his fraudulent scheme by mailing to shareholders a report of the status of the projects. Again on September 14, 1987, defendant Jagdish Berry sent report on the status of the project by United States mails to the shareholders. On or about December 15, 1987, defendant Jagdish Berry made use of the United States mails by sending a notice of investors meeting for December 27, 1987, the purpose of which meeting was to set forth false and fraudulent information concerning profits of The Greenbrier Corporation for purposes of defrauding the shareholders out of the benefit of their investment.

17. In furtherance of this plan or scheme, Defendants, Jagdish P. Berry, Virendra Berry and Surendra K. Berry

solicited such contributions through use of interstate telephone calls for the purpose of defrauding the shareholders. These telephone calls included numerous telephone calls between defendant Jagdish Berry and plaintiffs Magno P. Roque and Arvind K. Pathak during 1986, 1987 and 1988. In addition, a telephone conference occurred on December 27, 1987, during which defendant Jagdish Berry discussed the false and fraudulent information being used for calculation of dividends with the corporation's accountant Donna Evans. Upon information and belief, numerous other telephone calls regarding the false and fraudulent information occurred between defendant Jagdish Berry and Donna Evans.

18. In furtherance of this plan or scheme, and after having received the investments of the stockholders, Defendants, Jagdish P. Berry, Virendra Berry and Surendra K. Berry, in association with each other and their companies, Defendants Berry Associates, Inc., and A.J., Inc., began to siphon off the bulk of the profits of The Greenbrier Corporation by establishing fictitious entities, *ie.*, Northern Virginia Construction, S.B.S. Construction, and General Construction Services, which caused to be billed to The Greenbrier Corporation significant sums for services that were never performed by the fictitious entities. Each defendant knew of and participated in the establishment of these fictitious entities, the concealment of their interest in the entities and the embezzlement of funds through these entities.

19. The aforesaid Defendants, in furtherance of the plan or scheme, created false or fraudulent invoices designed to convince the corporation, its accountants and its shareholders into believing that a legitimate entity existed, and sought to conceal the fictitious nature of each entity by failing to list the address of each entity on its invoices, failing to properly endorse checks made out to the fictitious entities, 80 as to conceal the fact that these entities were none other than the Defendants themselves. The

amount of the checks from August 18, 1986, to March 17, 1987, to the fictitious General Construction Services was $141,167.63. The amount of checks from April 19, 1987, to May 20, 1987, to the fictitious Northern Virginia Construction was $26,354.30. The amount of checks from May 14, 1987, to June 19, 1987, to the fictitious S.B.S. Construction was $13,965.35.

20. In furtherance of that plan or scheme, Defendants, Jagdish P. Berry, Virendra Berry and Surendra E. Berry, in association and acting in concert with each other and their companies, Defendants, Berry Associates, Inc., and A.J., Inc., sought and obtained kickbacks from otherwise legitimate contractors providing services to The Greenbrier Corporation and to The Beulah Corporstion by having and obtaining from such contractors inflated billings to the corporation which were returned directly to Defendant, Jagdish Berry.

21. In furtherance of the plan or scheme, Defendants, Jagdish Berry, Virendra Berry and Surendra K. Berry, purported to make loans to The Greenbrier Corporation with the money that they had embezzled from the Greenbrior project, thereby charging and receiving interest from the corporation for such loans and further diverting assets and profits of the corporations to the Defendants for their personal use. These loans were made on or about March 9, 1989, April 1, 1987, April 6, 1987, April 24, 1987, May 5, 1987, June 10, 1987, June 15, 1987, and April 6, 1988.

22. In furtherance of the plan or scheme, Dofendants, Jagdish P. Berry, Virendra Berry and Surendra K Berry, purchased vehicles with monies of The Greenbrier Corporation ostensively to perform services on behalf of the corporation, but instead used the vehicles for their own benefit and use.

23. In furtherance of the plan or scheme, Defendant, Jagdish Berry, as the president and sole director of the corporation, purported to purchase from the corporation

a developed parcel of residential property for the sum of $170,000.00 for his own use, but which he simultaneously transferred to a third-party purchaser for $199,000.00, thereby fraudulently converting and embezzling approximately $29,000.00 of corporate assets for his own use.

24. In furtherance of the plan or scheme, Defendant, Jagdish Berry, executed checks payable to petty cash and falsely and fraudulently asserted that such petty cash payments were being used for corporate purposes, when in fact such payments were for his individual use and were unsupported by any documentation to establish any legitimate payment from corporate funds for the purposes of the petty cash. The total amount of alleged "petty cash" checks is $23,009.03.

25. In 1986, Defendants, Jagdish Berry, Virendra Berry and Surendra K. Berry, sought to continue this fraudulent pattern and practice by inducing several of the shareholders of The Greenbrier Corporation, to invest and purchase the stock of a second corporation, Plaintiff, The Beulah Corporation, purportedly for the development of the Beulah project.

26. As part of the scheme or plan, Defendants, Jagdish Berry, Virendra Berry and Surendra K. Berry induced Plaintiffs, Magno P. Roque and Arvind K. Pathak, and the class they represent to invest in shares of Professionals I, Inc. by falsely and fraudulently representing that Berry Associates, Inc., and A.J., Inc., would develop real property purchased by The Beulah Corporation (i.e., the Beulah project). In exchange, Defendants, Berry Associates, Inc., and A.J., Inc., would receive a development fee equal to 30 percent of the net profits of the corporations in developing and selling the real property, and that the shareholders would again enure significant profits.

27. In the meantime, in January 1988, Defendant, Jagdish Berry, caused to be mailed to the shareholders of Professionals, Inc., dividend checks which were signifi-

cantly lower than what they had been led to believe they would receive. Defendant, Jagdish Berry, also caused to be mailed to the shareholders false and fraudulent profit information and profit statements for purposes of determining the dividends to be paid to the shareholders and for purposes of the shareholders preparing their tax returns in order to carry out the scheme to fraudulently obtain assets of The Greenbrier Corporation by false pretenses. In connection with this activity, Defendants caused correspondence to be mailed from Donna J. Evans, CPA, on November 28, 1987, December 21, 1987, and December 31, 1987, all of which was designed by Defendants to facilitate the fraud upon Plaintiffs and the class of investors they represent.

28. At the same time, and in furtherance of the plan or scheme, Defendant, Jagdish Berry, as president and sole director of Professionals, Inc., failed and refused to call an annual shareholders' meeting as required by the laws of the Commonwealth of Virginia, 50 as to limit the shareholders' access to information concerning the corporate operations.

29. On January 29, 1988, Defendant, A.J., Inc., removed the sum of $2,000 from the bank accounts of The Greenbrier Corporation for no consideration. In addition, A.J., Inc. has been paid $10,966.78 for which it has not accounted to The Greenbrier Corporation.

30. In and during 1986, 1987 and 1988, Defendants, Jagdish Berry, Virendra Berry and Surendra K. Berry, in furtherance of their plan or scheme and in a continuation of this pattern and practice, used the embezzled funds from The Greenbrier Corporation to purchase the stock of The Beulah Corporation.

31. As a result of the distrust of Defendants, Jagdish Berry, Virendra Berry and Surendra K. Berry, caused by the dividend amounts received from the shareholders' investment in the Greenbrier venture, the shareholders of

The Beulah Corporation met on April 23, 1988, July 24, 1988, and October 9, 1988, to consider contracts of sale for the real property in the Beulah project. Upon considering the same, the shareholders voted to sell the Beulah project to a bona finde purchaser for $2.2 million.

32. In furtherance of the plan or scheme, and because they feared that the sale of the Beulah project would disrupt their pattern and practice of fraudulently embezzling assets from the shareholders of The Greenbrier Corporation and would prevent their embezzling assets from The Beulah Corporation, Defendant, Jagdish Berry, in association with Virendra Berry and Surendra K. Berry, refused to execute the real estate contracts on behalf of the corporation for the sale of the Beulah property despite being directed to do so; attempted to cancel the valid real estate contracts entered into with the bona fide purchasers; and prepared fraudulent contracts for the sale of the real property purporting to transfer said property to one or more of Defendants, Jagdish Berry, Virendra Berry and Surendra K. Berry; and instituted a legal action designed to extort money from the corporation in order that The Beulah Corporation would settle and sell the Beulah project to Defendants, Jagdish Berry, Virendra Berry and Surendra K. Berry.

33. On October 9, 1988, the shareholders of The Beulah Corporation held a special shareholders' meeting and voted Jagdish Berry out of office as president and director. At the same time, the shareholders elected new officers and demanded that Jagdish Berry turn over all the corporate books and records, which he refused to do.

34. In furtherance of the plan or scheme, Defendant, Jagdish Berry, in association with Virendra Berry and Surendra K. Berry, refused to vacate office or to turn over the books and records in an attempt to keep the sharehlders of The Beulah Corporation from discovering how

the corporate assets and profits were embezzled and diverted.

35. On or about November 1, 1988, defendant Virendra Berry, with the aid and cooperation of Jagdish Berry, fraudulently removed the sum of $22,000 from The Greenbrier Corporation for no consideration.

36. On December 11, 1988, the shareholders of The Greenbrier Corporation held a court ordered shareholders' meeting for the purpose, *inter alia*, of electing new officers and directors.

37. On December 6, 1988, the Circuit Court of Fairfax County, Virginia, issued an order directing "the current officers and directors of Professionals I, Inc. (*i.e.*, Jagdish Berry) shall not transfer, sell or request any assets of the corporation or take any other action which would hinder the shareholders from accomplishing the purposes of the December 11, 1988 annual shareholders' meeting." Notwithstanding the order, Defendant, Jagdish Berry, in direct violation of its terms and in furtherance of the plan and scheme secretly removed the sum of $100,000.00 from the corporate accounts at Perpetual Bank in his own name on December 8, 1988, as well as an additional $53,000.00 on December 13, 1988, after he was removed as president. The purpose of this action was to further this scheme or plan and to exert economic pressure on the corporation to deprive it of funds necessary to continue the corporation's existence and investigation.

38. On December 11, 1988, the shareholders of The Greenbrier Corporation removed Jagdish Berry as president and sole director and elected new officers and directors. At that meting and thereafter the new officers and directors demanded Defendant, Jagdish Berry, turn over the books and records of The Greenbrier Corporation.

39. In furtherance of the plan or scheme, Defendant, Jagdish Berry, refused to vacate office and provide cor-

porate books and records of The Greenbrier Corporation and The Beulah Corporation. As a result of these activities, Plaintiff, Arvind K. Pathak as president of Plaintiffs, The Greenbrier Corporation and The Greenbrier Corporation and The Beulah Corporation, sought and obtained injunctive relief from the Fairfax County Circuit Court on February 11, 1989, directing Defendant, Jagdish Berry, to provide all books and records of the corporation to the new officers, over the objection of Defendant Berry's counsel, that the corporations were not entitled to copies of the invoices for which Defendant, Jagdish Berry, in association with Virendra Berry and Surendra K. Berry, and Berry Associates, Inc., and A.J., Inc., paid from the funds of The Greenbrier Corporation for the services purportedly rendered by the fictitious entities as S.B.S. Construction, Northern Virginia Construction, and General Services Construction.

40. In furtherance of the plan or scheme, on March 1, 1989, Defendants, Jagdish Berry, Virendra Berry and Surendra K. Berry, mailed or caused to be mailed a request for a special shareholders' meeting to be held in Frederick, Maryland on March 12, 1989, for the purposes of the discussing the expenses incurred by The Greenbrier Corporation and The Beulah Corporation. It was the intent of Defendants, Jagdish, Virendra and Surendra Berry, to provide false and fraudulent information regarding the assets of the corporations at the meetings of March 12, 1989, in order to defraud the investors of the benefit of their investments. Defendants conduct in causing the notice of meetings to be mailed constituted mail fraud in violation of 18 U.S.C. §1341.

41. As a result of the notices mailed, a shareholders' meeting was held on March 12, 1989, during which time Jagdish Berry falsely and fraudulently represented that the expenses paid by Greenbrier were legitimate expenses and attempted to induce Plaintiffs, Magno P. Roque and Arvind K. Pathak, and the class of shareholders they rep-

resent to cease their investigation into Defendants' racketeering activities and to accept Defendants false and fraudulent representations without reviewing the corporations' underlying documents. In furtherance of their scheme Defendants and their counsel made further representations that no improper activity had occurred, all designed to lull Plaintiffs into reliance on the false information presented. In furtherance of their scheme, at the meeting of March 12, 1989, Defendants, Jagdish P. Berry, Virendra Berry and Surendra K. Berry, and their counsel represented that the invoices which had been paid from The Greenbrier Corporation funds were not the property of The Greenbrier Corporation, but rather were the property of Defendant, Berry Associates.

42. On March 24, 1989, Plaintiff, Arvind K. Pathak, as president of The Greenbrier Corporation and The Beulah Corporation, moved the Fairfax County Circuit Court for a contempt citation, finding Jagdish Berry in contempt of court for failing to produce the documents and records which were ordered on February 11, 1989. On that date, the Fairfax County Circuit Court ordered Berry to turn over every book and record of the corporation by Tuesday, March 28, 1989, or Mr. Berry would be incarcerated. In response, Mr. Berry, through counsel, produced numerous documents, bills and invoices from the fictitious entities named above, as well as several contracts through which kickbacks were paid.

43. In a furtherance of their plan and attempt to thwart the shareholders of The Greenbrier Corporation and The Beulah Corporation from uncovering the full extent of their unlawful activity, Defendants, Jagdish Berry, Virendra Berry and Surendra K. Berry, filed a series of lawsuits in the Fairfax County Circuit Court seeking to discourage and intimidate the shareholders from proceeding with any investigation of Defendants unlawful scheme or litigation, and designed to exert economic pressure upon Plaintiffs

so that they would abandon their efforts to terminate Defendants racketeering activity.

44. Defendants' scheme to defraud Plaintiff corporations and their shareholders constitutes a continuing threat to the citizens of the Commonwealth of Virginia and citizens of other States because it was Defendants' intention to engage in repetitious real estate development schemes including making misrepresentations to potential shareholders to induce them to invest in real estate projects, embezzle and divert the corporate profits to Defendants, and then, by use of mail fraud, wire fraud and transportation of goods and money in interstate commerce to defraud the corporations and shareholders by seeking to redeem corporate stock from the shareholders at artificially deflated prices with the expectation that the shareholders would not seek to incur legal, accounting and other fees to investigate and uncover Defendants' scheme to embezzle and divert corporate assets.

45. Defendants individually and through litigation undertook substantial continuing acts induced to lull Plaintiff corporations and Plaintiff shareholders into a belief that the corporations and shareholders were not victims of embezzlement or fraud. This active concealment included preparation of false and fraudulent invoices to cover the embezzlement performed by Defendants, repeated representations to Plaintiffs that no embezzlement had occurred, active attempts to avoid providing corporate documents to the new officers and Directors of the corporations, demanding and scheduling a shareholders meeting designed to cause Plaintiffs to resolve differences among the parties without disclosure of the fraudulent acts, instituting voluminous litigation and aggressively avoiding Plaintiffs' attempts at investigation in order to cause substantial attorneys' fees to be incurred to induce the shareholders officers and Directors of the corporations to conclude that further investigation would not be economically justified, continuing to represent the accuracy of fraudulent docu-

ments, actively resisting and refusing to provide underlying books and records of the corporation, violating the terms of an injunction issued by the Circuit Court for Fairfax County, Virginia on February 11, 1989, directing Defendant, Jagdish Berry, to turn over the books and records of the corporation to its new officers and Directors, and further violating the injunction by providing false and fraudulent documentation upon threat of contempt in an effort to conceal the embezzlement and fraudulent activity.

46. Subsequent to the events set forth above, Defendants have solicited out of state investors to invest in construction projects with the intention of undertaking the same fraudulent activity as is set forth herein.

47. Defendants' conduct in attempting to defraud plaintiff shareholders continues to the present time. The mail fraud, wire fraud and transportation of stolen property in interstate commerce constitute the type of activity in which Defendants have previously engaged and in which they normally and continuously conducted their business.

48. Defendants' scheme to defraud the corporations and their shareholders constitutes mail fraud in violation of 18 U.S.C. §1341. The specific incidents of mail fraud by Defendants include the following:

(a) Defendants made use of the United States mail in order to initially solicity contributions from shareholders in the form of purchase of corporate stock of Professionals, Inc. and Professionals I, Inc. with the intention of fraudulently obtaining money from the corporations. These mailings occurred, *inter alia*, during the periods from September 1985 to April 1986.

(b) Defendants have caused to be mailed false and fraudulent information containing misrepresentations as to legitimate expenses of the corporations to the accountant for the corporation for the purpose of carrying out its

scheme to obtain money and property of The Greenbrier Corporation by false pretenses. These mailings occurred on a monthly basis from July 1986 through at least December 1988.

(c) Defendants have caused to be mailed to the shareholders false and fraudulent profit information and profit statements for purposes of determinations of dividends to be paid to shareholders and also for purposes of shareholders preparing their tax returns in order to carry out their scheme to fraudulently obtain assets of The Greenbrier Corporation by false pretenses. These mailings occurred, *inter alia*, on November 28, 1987, December 21, 1987, and December 31, 1987.

(d) Defendants have caused the accountant for the corporation to make use of the United States mails in order to conceal the embezzlement and fraud perpetrated by Defendants and to induce the shareholders to accept the false information as accurate in order to defraud the shareholders of The Greenbrier Corporation.

(e) Defendants have made use of the United States mails by inducing the corporation on or about March 1, 1989, to send out a notice of meeting to its shareholders the purpose of which was to cause the shareholders to drop their investigation, and rely on the false and fraudulent representations of Defendants as to the profits and value of the corporation and its stock and to enable Defendants to profit from the fraudulent scheme and escape its detection.

(f) Defendants have made use of the United States mails by sending correspondence to all shareholders on or about March 3, 1989, designed to cover up the fraudulent conduct of Defendants.

49. Defendants have made use of interstate telephone calls the purpose of which were to commit wire fraud upon Plaintiff corporations and Plaintiff shareholders in violation

of 18 U.S.C. §1343. These include numerous telephone conversations between Jagdish Berry and Magno Roque and Arvind K. Pathak, telephone conversations between Jagdish Berry and Donna Evans, and other telephone conversations.

50. Defendants have made use of Interstate Commerce in furtherance of their scheme to defraud Plaintiff corporations and Plaintiff shareholders in violation of 18 U.S.C. §2314 by the following conduct:

(a) Defendants have induced Plaintiff shareholders to make contributions for the purchase of corporate stock in The Greenbrier Corporation in excess of $5,000 and in The Beulah Corporation in excess of $5,000 in order to perpetrate the fraud and embezzlement upon shareholders and the corporations. In so doing, Defendants have caused to be transported such funds in interstate commerce.

(b) Defendants have caused to be carried in interstate commerce in excess of $5,000 purported to be full divident checks and which was carried out in furtherance of the scheme to defraud.

(c) Defendants have caused shareholders meetings to be held in Cumberland, Maryland in April 1986, on November 7, 1987, December 27, 1987, April 23, 1988, and Frederick, Maryland, on March 12, 1989, inducing shareholders to be transported in interstate commerce for the purposes of inducing Plaintiff corporations and Plaintiff shareholders to rely upon the false and fraudulent representations by Defendants and to lull Plaintiffs into a belief of the misrepresentations asserted by Defendants.

(d) In furtherance of their scheme to defraud, Defendants have caused shareholders from the State of Maryland to be transported to Virginia for shareholders meetings on November 21, 1987, December 19 987, and December 11, 1988, in order to defraud such s. reholders of $5,000 or more.

51. Plaintiffs, Pathak and Roque, are buyers of the stock of the corporations as are the class of shareholders they represent. The sale of stock and proceeds affected interstate commerce by crossing state lines between Virginia where the Defendants are located and Maryland where Plaintiff, Roque, and other shareholders in the class Plaintiff represented are located. The scheme to defraud was already envisioned when the Defendants offered the stock of Greenbrier and Beulah for sale to the Plaintiffs and such scheme could not succeed without the influx of money for the purchase of stock by the Plaintiffs. The Defendant, Jagdish Berry, induced and persuaded the Plaintiffs' shareholders to purchase shares in the corporation for the sole purpose of defrauding them of the corporate profits and reduce the amount they would receive upon dissolution and liquidation of the corporation. The existence of such a scheme to defraud is a material fact to which any reasonable person would attach importance in making a decision to purchase the stock. The Plaintiff shareholders relied on Defendants' good faith in making statements that developing corporate property would present a reasonable opportunity for profits and such profits would determine Berry's development fee since Berry would be dependent on a percentage of estimated profits. The misrepresentation by Defendants in connection with the sale of stock constitute violation of 15 U.S.C. §78(j) and 17 CFR, Ch. 11 §240 Rule 10b-5.

CAUSES OF ACTION

COUNT I

(Racketeer Influenced and Corrupt Organizations Act)

52. The allegations of Paragraph 1-51 are incorporated herein.

53. Defendants are persons as defined in 18 U.S.C. § 1961(3), and are persons as to whom certain activity set forth in 18 U.S.C. §1962 is prohibited.

54. Professionals, Inc. (The Greenbrier Corporation) is an enterprise as defined in 18 U.S.C. §1961(4).

55. The activities of Professionals, Inc. (The Greenbrier Corporation) affect interstate commerce, *inter alia*, because its shareholders are from different States, because its shareholder meetings require travel in interstate commerce, because it deals with employees, materialmen and suppliers from jurisdictions within and without the Commonwealth of Virginia and because it makes use of interstate banking institutions.

56. Defendants were each either employed by or associated with Professionals, Inc. (The Greenbrier Corporation) at all times relevant to this action.

57. Defendants engaged in the affairs of Professionals, Inc. (The Greenbrier Corporation) through a pattern of racketeering activity including fraud, embezzlement as set forth above, in violation of 18 U.S.C. §1962(c).

58. Defendants secretly planned and aided each other in undertaking the fraud and violations of 18 U.S.C. §1962(c) and knowingly conspired together to carry out and then to cover up the violations of 18 U.S.C. §1962(c), which is itself violation of 18 U.S.C. §1962(d).

59. The Plaintiff is entitled to recover triple damages and cost of its suit, including reasonable attorneys' fees, under the provisions of 18 U.S.C. Section 1964(c).

60. As a result of the activities engaged in by the Defendants, the Plaintiff, The Greenbrier Corporation, has suffered *inter alia* the following damages in the development of the Greenbrier project (i) fraudulent conversion of the sum of $141,167 63 representing payments from the corporation to the fictitious General Construction Services for services fraudulently represented to have been performed but never performed; (ii) fraudulent conversion of the sum of $26,355.10 representing payments from the corporation to the fictitious Northern Virsinia Construction

for services fraudulently represented to have been performed but never performed; (iii) fraudulent conversion of the sum of $13,965 35 representing payments from the corporation to the fictitious S.B.S. Construction for services fraudulently represented to have been performed but never porformed; (iv) embezzlement of the sum of $23,009.03 representing payments diverted by Jagdish Berry to his own benefit and described as "petty cash"; (v) the sum of $29,000 representing profits fraudulently embezzled from the corporation by Jagdish Berry converting the corporate opportunity and sale of the res idential lot; (vi) the sum of $153,155.10 representing funds embezzled from Perpetual Bank on December 8 and 13, 1988; (vii) the amount of approximately $100,000 representing expenses incurred by the corporation to uncover and investigate the fraudulent activity of Defendants, (viii) the amount of S22,000 removed by Virendra Berry, and (ix) the amount of $2,000 removed by A.J., Inc.

WHEREFORE:

(a) Plaintiff, The Greenbrier Corporation, demands judgment of Defendants jointly and severally in the amount of $500,000 which pursuant to the terms of 18 U.S.C. Section 1962(c) should be trebled and full treble damages awarded in favor of Plaintiff, The Greenbrier Corporation.

(b) Plaintiff, The Greenbrier Corporation, requests that an injunction be issued directing Defendants to cease and desist from engaging in schemes in violation of the terms of 18 U.S.C. Section 1962.

(c) Plaintiff, The Greenbrier Gorporation, requests an order be issued directing Defendants be divested of any interest direct or indirect to The Greenbrier Corporation, or any claim against it, pursuant to the terms of 18 U.S.C. Section 1964(a).

(d) Plaintiff, The Greenbrier Corporation, requests that it be awarded its attorneys' fees and costs of this action.

COUNT II

(Racketeer Influenced and Corrupt Organizations Act)

61. Plaintiffs incorporate the allegations of paragraphs 1-60 hereof.

62. Defendants intended to defraud plaintiff shareholders and the class of shareholders they represent of their investment in The Greenbrier Corporation Defendants established and maintained The Greenbrier Corporation for purposes of defrauding the shareholders of their investment and the profits of their investment Defendants intended to cause the shareholders to redeem their stock for or accept in dissolution of The Greenbrier Corporation an amount artificially deflated due to the fraudulent embezzlement by Defendants.

63. Plaintiffs have been damaged due to the reduction in value of their investment resulting from Defendants' fraudulent scheme.

WHEREFORE

(a) Plaintiffs, Magno P. Roque and Arvind K. Pathak, individually and on behalf of each shareholders of The Greenbrier Corporation demand judgment in the amount of $100,000 each which pursuant to the terms of Section 1964(c) should be trebled and treble damages be awarded Plaintiffs.

(b) Plaintiffs request that an injunction be issued directing Defendants to cease and desist from engaging in schemes in violation of the terms of 18 U.S.C. Section 1962.

(c) Plaintiffs request that they be awarded their attorneys' fees and costs pursuant of this action.

COUNT III

(Racketeer Influenced and Corrupt Organizations Act)

64. The allegations of paragraphs 1-51 are incorporated herein by reference and made part hereof.

65. Defendants are persons as defined in 18 U.S.C. §1961(3), and are persons as to whom certain activity set forth in 18 U.S.C. §1962 is prohibited.

66. Professionals I, Inc. (The Beulah Corporation) is an defined in 18 U.S.C. §1961(4).

67. The activities of Professionals, Inc. (The Beulah Corporation) affect interstate commerce, inter alia, because its shareholders are from different States, because its shareholder meetings require travel in interstate commerce, because it deals with employees, materialmen and suppliers from jurisdictions within and without the Commonwealth of Virginia and because it makes use of interstate banking institutions.

68. Defendants, Jagdish, Virendra, Surendra K. Berry, Berry Associates, Inc and A.J, Inc., received income from a pattern of racketeering activity, as set forth above from Professionals, Inc. (The Greenbrier Corporation).

69. Defendants inverted parts of the proceeds of such income in acquiring their interest in Professionals I, Inc. (The Beulah Corporation), in violation of 18 U.S.C. §1962(a).

70. Defendants acquired an interest in Professionals, Inc. (The Beulah Corporation) through the fraudulently embezzled funds of Professionals, Inc. (The Greenbrier Corporation) in violation of 18 U.S.C. §1962(b).

71. Defendants acted in concert and conspired to fraudulently embezzle funds from Professionals, Inc. (The Greenbrier Corporation) in order to purchase an interest in Professionals I, Inc. (The Beaulah Corporation) in violation of 18 U.S.C. §1962(d).

72. In furtherance of Deffendants' scheme and plan, defendant Jagdish Berry embezzled the amount of $15,000 from Professionals I, Inc. (The Beulah Corporation) on or about October 5, 1988, in violation of 18 U.S.C. §1962(c).

Defendant Jagdish Berry and Virendra Berry then attempted to use the embezzled funds to make a down payment for purchase of the property held by The Beulah Corporation, in violation of §1962(a) and (b).

73. The Plaintiffs are entitled to recover treble damages and costs of their suit, including reasonable attorney's fees, under the provisions of 18 U.S.C. §1964(c).

74. As a result of the activities engaged in by the Defendants, the Plaintiff, The Beulah Corporation, has suffered damages including (i) cost to defend the frivolous litigation brought against it by Jagdish Berry in October 1988; (ii) costs and expenses of investigating the fraudulent activity and scheme by Defendants in the approximate amount of $100,000; (iii) the $15,000 embezzled by defendant Jagdish Berry; and (iv) the contribution made by Defendants allegedly to purchase the stock in The Beulah Corporation, which arose from the embezzled assets of The Greenbrier Corporation in the Greenbrier project.

WHEREFORE:

(a) The Beulah Corporation (Beulah Road) demands judgment in the amount of $150,000 which pursuant to the terms of Section 1964(c) should be trebled and Plaintiff, The Beulah Corporation, be awarded treble damages, hereunder.

(b) The Beulah Corporation requests that Defendants be ordered to cease and desist from engaging in conduct in violation of 18 U.S.C. §1962.

(c) The Beulah Corporation requests that an order be issued directing Defendants be divested of any interest, direct or indirect, in The Beulah Corporation, or any claim against it.

(d) That The Beulah Corporation be awarded its attorneys' fees and costs.

COUNT IV

(Racketeer Influenced and Corrupt Organizations Act)

75. The allegations of paragraph 1-51 and 65-74 are incorporated herein by reference and made a part hereof.

76. Defendants intended to defraud plaintiff shareholders and the class of shareholders they represent of their investment in The Beulah Corporation. Defendants established and maintained The Beulah Corporation for purposes of defrauding the shareholders of their investment and the profits of ther investment. Defendants intended to cause the shareholders to redeem their stock for or accept in dissolution of The Beulah Corporation an amount artificially deflated due to the fraudulent embezzlement by Defendants.

77. Plaintiffs have been damaged due to the reduction in value of their investment resulting from Defendants fraudulent scheme.

78. As a result of the activities engaged in by the Defendants, the Plaintiffs, Magno P. Roque and Arvind K. Pathak, and the class they represent suffered damages including, but not limited to, the fair value of the stock in their corporation, potential adverse tax ramifications due to the fraudulent representations pertaining to fictitious expenses and embezzled funds by Defendants, attorneys' fees and other amounts expended by them in an attempt to obtain the fair value of their stock and other appropriate relief and damages for emotional distress.

WHEREFORE:

(a) Plaintiffs, Magno P. Roque and Arvind K. Pathak, individually on behalf of shareholders of The Beulah Corporation demand judgment in the amount of $100,000 each which pursuant to the terms of Section 1964(c) should be trebled and treble damages be awarded Plaintiffs.

(b) Plaintiffs request that an injunction be issued directing Defendants to cease and desist from engaging in schemes in violation of the terms of 18 U.S.C. Section 1962.

(c) Plaintiffs request that they be awarded their attorneys' fees and costs pursuant of this action.

COUNT V

(Racketeer Influenced and Corrupt Organizations Act)

79. The allegations of Paragraph 1-51 are incorporated herein.

80. Defendants, Jagdish Berry, Virendra Berry and Surendra K. Berry, are persons as defined in 18 U.S.C. §1961(3), and are persons as to whom certain activity set forth in 18 U.S.C. §1962 is prohibited.

81. A.J., Inc. is an enterprise as defined in 18 U.S.C. §1961(4). Berry Associates is an enterprise as defined in 18 U.S.C. §1961(4).

82. The activities of A.J., Inc. and Berry Associates affect interstate commerce, *inter alia*, because its shareholders, officers and directors travel in interstate commerce to solicit business and investment, because it deals with employees, materialmen and suppliers from jurisdictions within and without the Commonwealth of Virginia and because it makes use of interstate banking institutions.

83. Defendants, Jagdish, Virendra and Surendra K. Berry, were each either employed by or associated with A.J., Inc. and/or Berry Associates, at all times relevant to this action.

84. Defendants, Jagdish, Virendra and Surendra K. Berry, engaged in the affairs of A.J., Inc. and/or Berry Associates through a pattern of racketeering activity including fraud, embezzlement as set forth above, in violation of 18 U.S.C. §1962(c).

85. Defendants secretly planned and aided each other in undertaking the fraud and violations of 18 U.S.C. §1962(c) and knowingly conspired together to carry out and then to cover up the violations of 18 U.S.C. §1962(c), which is itself a violation of 18 U.S.C. §1962(d).

86. The Plaintiff is entitled to recover triple damages and costs of its suit, including reasonable attorneys' fees, under the provisions of 18 U.S.C. Section 1964(c).

87. As a result of the activities engaged in by the Defendants, the Plaintiff, The Greenbrier Corporation, has suffered *inter alia* the following damages in the development of the Greenbrier project: (i) fraudulent conversion of the sum of $141,167.63 representing payments from the corporation to the fictitious General Construction Services for services fraudulently represented to have been performed but never performed; (ii) fraudulent conversion of the sum of $26,355.10 representing payments from the corporation to the fictitious Northern Virginia Construction for services fraudulently represented to have been performed but never performed; (iii) fraudulent conversion of the sum of $13,965.35 representing payments from the corporation to the fictitious S.B.S. Construction for services fraudulently represented to have been performed but never performed; (iv) embezzlement of the sum of $23,009.03 representing payments diverted by Jagdish Berry to his own benefit and described as "petty cash"; (v) the sum of $29,000 representing profits fraudulently embezzled from the corporation by Jagdish Berry converting the corporate opportunity and sale of the residential lot; (vi) the sum of $153,155.10 representing funds embezzled from Perpetual Bank on December 8 and 13, 198; (vii) the amount of approximately $100,000 representing expenses incurred by the corporation to uncover and investigate the fraudulent activity of Defendants, and (vii) the amount of $22,000 removed by Virendra Berry.

WHEREFORE:

(a) Plaintiff, The Greenbrier Corporation, demands judgment of Defendants, Jagdish, Virendra and Surendra K. Berry, jointly and severally in the amount of $500,000 which pursuant to the terms of 18 U.S.C. Section 1962(c) should be trebled and full treble damages awarded in favor of Plaintiff, The Greenbrier Corporation.

(b) Plaintiff, The Greenbrier Corporation, requests that an injunction be issued directing Defendants, Jagdish, Virendra and Surendra K. Berry, to cease and desist from engaging in schemes violating the terms of 18 U.S.C. Section 1962.

(c) Plaintiff, The Greenbrier Corporation, requests an order be issued directing Defendants, Jagdish, Virendra and Surendra K. Berry, be divested of any interest or indirect to The Greenbrier Corporation, or any claim against it, pursuant to the terms of 18 U.S.C. Section 1964(a).

(d) Plaintiff, The Greenbrier Corporation, requests that it be awarded its attorneys' fees and costs of this action.

COUNT VI

(Racketeer Influenced and Corrupt Organizations Act)

88. Plaintiffs incorporate the allegations of paragraphs 1-51 and 80-87 hereof.

89. Defendants, Jagdish, Virendra and Surendra K. Berry, intended to defraud plaintiff shareholders and the class of shareholders they represent of their investment in The Greenbrier Corporation. Defendants established and maintained The Greenbrier Corporation for purposes of defrauding the shareholders of their investment and the profits of their investment. Defendants intended to cause the shareholders to redeem their stock for or accept in dissolution of The Greenbrier Corporation an amount artificially deflated due to the fraudulent embezzlement by Defendants.

90. Plaintiffs have been damaged due to the reduction in value of their investment resulting from Defendants' fraudulent scheme.

WHEREFORE:

(a) Plaintiffs, Magno P. Roque and Arvind E. Pathak, individually on behalf of shareholders of The Greenbrier Corporation demand judgment in the amount of $100,000 each which pursuant to the terms of Section 1964(c) should be trebled and treble damages be awarded Plaintiffs.

(b) Plaintiffs request that an injunction be issued directing Defendants to cease and desist from engaging in schemes in violation of the terms of 18 U.S.C. Section 1962.

(c) Plaintiffs request that they be awarded their attorneys' fees and costs pursuant of this action.

COUNT VII

(Breach of Fiduciary Duty, Breach of Corporate Opportunity)

91. This Court has jurisdiction of th is count because the actions and activities involved herein are identical to those set forth in Counts I-VI and this Court, therefore, has pendant jurisdiction over the claims herein.

92. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 51 hereof.

93. Defendant, Jagdish Berry, as an officer and Director of The Greenbrier Corporation and The Beulah Corporation, had a fiduciary duty to act in the best interest of the corporation and for the benefit of its shareholders and not to take any action which would give him personal advantage over shareholders of the corporation.

94. Defendant, Jagdish Berry, acting as officer and Director of The Greenbrier Corporation and The Beulah Cor-

poration on numerous occasions took action in breach of his fiduciary duty to his shareholders and in defraud of the shareholders and the corporations including transferring corporate assets to fictitious entitles known to him only as fictitious entities with the intent to defraud the shareholders of the corporation and with the intent to benefit himself and his co-conspirators. In so doing, Defendant, Jagdish Berry, and his co-conspirators activity concealed the information pertaining to these fictitious companies from the shareholders.

95. In further breach of his fiduciary duties, Defendant, Jagdish Berry, loaned himself assets of the corporation without the knowledge of the shareholders for his sole benefit. Defendant, Jagdish Berry, further transferred assets to his own name and dealt with corporate assets in a manner which defrauded the shareholders as set forth above.

96. In further breach of Defendant, Jagdish Berry's, fiduciary duties, Defendant, Jagdish Berry, entered contracts with the corporation which were not in the best interest of the corporation, were not with the knowledge of the shareholders and were designed solely to benefit himself and cause damage to the corporations.

97. Defendant, Jagdish Berry, was not acting in good faith in conducting the business, because his main motivation was to benefit himself and his co-conspirators.

98. Defendants, Virendra Berry and Surendra K. Berry, conspired with Defendant, Jagdish Berry, to breach his fiduciary duties with regard to the corporation.

99. As a result of the breach of fiduciary duties by Defendants, Jagdish Berry, and his co-conspirators Virendra Berry and Surendra K. Berry, The Greenbrier Corporation has been damaged in an amount in excess of $500,000, The Beulah Corporation has been damaged in an amount in excess of $100,000, and the Plaintiff sharehodlers, Magno P. Roque and Arvind K. Pathak, and the

class of shareholders they represent have each been damaged in an amount in excess of $100,000 each.

WHEREFORE:

(a) Plaintiffs demand judgment against Defendants, Jagdish Berry, Virendra Berry and Surendra K. Berry, as follows:

(b) Plaintiff, Professionals I, Inc., The Beulah Corporation, demands judgment in the amount of $100,000.

(c) Plaintiff, Professionals, Inc, The Greenbrier Corporation, demands judgment against Defendants in the amount of $500,000.

(d) Plaintiffs, Magno P. Roque and Arvind E. Pathak individually and on behalf of each shareholder of the corporation, demand judgment in the amount of $100,000 each.

(e) All Plaintiffs demand exemplary damages of $1,000,000.

(f) All Plaintiffs demand reasonable attorneys' fees and costs of this action.

COUNT VIII

(Fraud)

100. This Court has jurisdiction of this count because the actions and activities involved herein are identical to those set forth in Counts I-VI and this Court, therefore, has pendant jurisdiction over the claims herein.

101. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 51 hereof.

102. Defendants, Jagdish P. Berry, Virendra Berry and Surendra K. Berry, falsely represented to Plaintiff, The Greenbrier Corporation, that services were performed by various fictitious entities including General Construction

Services, Inc., Northern Virginia Construction, S.B.S. Construction and that certain invoices by those companies were due and owing from Plaintiff, The Greenbrier Corporation. Further, those Defendants represented that certain expenses had been incurred for petty cash, and for services by A.J., Inc. and Berry Associates.

103. Defendants, Jagdish P. Berry, Virendra Berry and Surendra K. Berry, knew the statements set forth in the preceding paragraph were false when made.

104. Defendants, Jagdish P. Berry, Virendra Berry and Surendra K. Berry, made the foregoing statements and representations with the intention that Plaintiff, The Greenbrier Corporation, rely upon them, and with knowledge and the intention that Plaintiff, The Greenbrier Corporation, act in reliance on them.

105. Plaintiff, The Greenbrier Corporation, acted in reliance upon the false and fraudulent statement of thsoe Defendants to their detriment, as a result of which Plaintiff, The Greenbrier Corporation, has suffered damage in the amount in excess of $500,000.

WHEREFORE:

(a) Plaintiff, The Greenbrier Corporation, demands judgment against Defendants in the amouont of $500,000.

(b) Plaintiff, The Greenbrier Corporation, demands exemplary damages in the amount of $1,000,000.

(c) Plaintiff demands reasonable attorneys' fees and costs of this action.

Respectfully submitted,

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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

CIVIL ACTION NUM. 89-0787-A

PROFESSIONALS, INC., et al
Plaintiffs

v.

JAGDISH BERRY, et al
Defendants

FILED
SEP 5 1989

RESPONSE TO AMENDED COMPLAINT, COUNTERCLAIM, AFFIRMATIVE AND OTHER DEFENSES, JOINDER OF ADDITIONAL PARTIES, AND OTHER

COME NOW defendants, Jagdish Berry, Virendra Berry, Surendra Berry, Berry Associates, Inc. and A.J., Inc., through undersigned counsel, and respectfully aver and pray:

RESPONSE TO COMPLAINT PARTIES

1. Admit paragraphs 1 and 2 and state that Professionals, Inc. and Professionals I, Inc. were separately formed and operated separately for each to separately develop a certain specific residential real estate and to construct and sell houses on said residential real estate after which the corporation were to be dissolved.

2. Admit of paragraphs 3 and 4 under Parties that Magno Roque and Arvind K. Pathak are shareholders of Profes-

sionals, Inc. and Professionals I, Inc. and are residents of Maryland and Virginia respectively. Neither admit nor deny for lack of

* * *

104. That William P. Dale, Esquire, is a party of the complaint since he has been an active participant with the plaintiffs and the secretary and a director of both corporations at the time That the plaintiffs finally executed their scheme to appropriate for themselves the monies belonging to the defendants as part of the plaintiffs' scheme which they conceived and developed from 1985 and which culminated and was finally executed in 1988 and 1989.

105. That all the activities undertaken by the defendants for the plaintiffs were in the benefit, with the knowledge and approval of the directors, shareholders, and/or of the plaintiffs and resulted in benefits to the plaintiffs and as a matter of law the defendants are not liable to the plaintiffs.

106. That plaintiffs are estopped by their actions from making any claims against defendants, if any they had.

107. That any losses suffered or alleged by plaintiffs are not the result of any actions taken by defendants under 18 U.S.C. 1961 et seq and there is no remedy for these in the present cause of action.

108. The amended complaint does not state a cause of action.

109. The amended complaint's allegations under RICO do not constitute indictable predicate acts.

110. The RICO statute, 18 U.S.C. 1962 et seq, is nconstitutional because it is vague and for other reas s.

111. The statute of limitations has expired.

COUNTER CLAIM AGAINST EACH AND EVERY PLAINTIFF

COME NOW defendants and counterclaim against each plaintiff individualiy and collectively and against each member of the class of plaintiff shareholders as follows:

112. That the term plaintiff or plaintiffs, plaintiff shareholders or plaintiff shareholders includes the individual and corporate plaintiffs both individually and collectively as well as any and all other persons and/or entities sued by the defendants as part of this cause of action.

113. That defendants Jagdish, Virendra, and Surendra Berry are of legal age and residents of Virginia. That defendants Berry Associates, Inc. and A.J., Inc. are Virginia corporations authorized to conduct business in Virginia.

114. Defendants Jagdish Berry, Virendra Berry, and Surendra Berry have been involved in the construction business for the past 10 years.

115. Surendra Berry has been employed as a laboratory technician of the D.C. General Hospital for the past 10 years.

116. Jagdish Berry was a professor at the University of D.C. for at least 10 years until 1988.

117. Vivendra Berry has been employed in the construction business for the past 9 years and prior to that held other employment.

118. Defendants Jagdish Berry, Surendra Berry, and Virendra Berry have only been active as shareholders, contractors, and in other manners in the construction business since approximately 1978 and only with each other and entities in which only they were involved. That the only exception was their investments and activities in Professionals, Inc. and Professionals I, Inc. That Jagdish Berry,

Virendra Berry, and Surendra Berry are shareholders of Professionals, Inc. and Professionals I, Inc. and have invested approximately $240,000.00 between the two corporations.

119. That on June 22, 1985, Jagdish Berry entered into a contract with the owner of the real property located in Beulah Road, Fairfax County, for the purchase by Jagdish Berry of this real property. That this property was eventually assigned to the Beulah Corporation and resold by the Beulah Corporation and is the property known as the Beulah Road project and involved eventually one of plaintiff corporations.

120. That the Beulah road property was bought by Jagdish Berry for the purpose of developing and selling houses built on it and that all if this was to be done by the defendants without the participation of any other person or entity.

121. That prior to June 25, 1985, neither Jagdish Berry, Virendra Berry nor Surendra Berry nor Berry Associates, Inc. nor A.J. Inc. knew any of the other plaintiffs or the other shareholders of professionals, Inc. and/or Professional I, Inc.

122. That prior to June 25, 1985, neither Jagdish Berry, Virendra Berry nor Surendra Berry nor Berry Associates, Inc. nor A.J. Inc. had any business or social contacts or dealings with any of the other plaintiffs or the other shareholders of Professionals, Inc. and/or Professionals I, Inc.

123. That since at least 1985 Dr. Shukla, the brother-in-law of plaintiff Arvind K. Pathak, worked at the D.C. General Hospital and because of this met Surendra Berry through their work at the D.C. General Hospital.

124. That after June 25, 1985, Dr. Shukla learned through his conversations with Surendra Berry that the defendants were involved in the construction business and in real es-

tate and had bought the Beulah Project (described below and in the amended complaint) property.

125. That prior to June 22, 1985 defendants Jagdish Berry, Surendra Berry, and Virendra Berry only knew Vijay Kumar, one of the shareholders of the Beulah Corporation.

126. That at all times until being induced through the misrepresentations of plaintiffs to join the Greenbrier and Beulah Corporations, and after this, Jagdish Berry, Virendra Berry, and Surendra Berry had developed real property and constructed and sold residential houses built on said real property either as individuals or through various corporations of which they were the sole shareholders.

127. That A.J., Inc. and Berry Associates, Inc. had acquired and developed real property and had constructed and sold residential houses built on real property.

128. That of June 25, 1985, and since then, none of the defendants requested nor desired the participation or investment of any of the plaintiffs in order to proceed with their businesses in the contruction business and/or real estate.

129. That as of June 25, 1985, and since then, none of the defendants desired the participation or investment of any of the plaintiffs, nor had any financial need for other investors, in. order to proceed with their businesses in the contruction business and/or real estate.

130. That at no time has any of the defendants solicited that any of the plaintiffs, nor any other persons or entities, invest any monies or participate in any way in the construction business or in any real estate business with any of the defendants.

COUNT I.

131. That prior to 1985, and since then, plaintiff Arvind K. Pathak, in conspiracy with the other plaintiff share-

holders and others, devised one or more schemes by which they would make use of their other endeavors, especially being doctors in medicine. to gain access to and the confidence of builders and others such as defendants in order to get them to agree to invest with plaintiff shareholders in real estate so that plaintiffs could deprive the builders and others of their investments and profits. This scheme continues to the present.

132. That the plaintiff's devised the scheme and as part of it they would, as they do, embezzle the monies belonging to defendants by keeping defendants' monies for their own use and purposes. That the plaintiffs have embezzled and/or otherwise illegally taken at least, and over, $1,890,000.000 from the defendants as represented by the following monies:

A. Over $300,000.00 earned by Berry Associates, Inc. as its 30% for its efforts that resulted in over $1,000,0000.00 profits for the shareholders of the Beulah corporation.

B. Approximately $155,000,00 invested by defendants Jagdish, Virendra, and Surendra Berry in plaintiff Beulah Road (Professionals I, Inc.) corporation.

C. Approximately $90,000 invested by defendants Jagdish, Virendra, and Surendra Berry in plaintiff Greenbrier (Professionals, Inc.) corporation.

D. Over $175,000.00 belonging to defendants Jagdish, Virendra and Surendra Berry as their share of the profits of the Beulah corporation.

E. Over $400,000.00 of profits for Berry Associates, Inc. and/or A.J., Inc. which result from the breach of contract by plaintiffs by forcibly selling the Beulah property.

F. Over $500,000.00 of profits that resulted from the resale of the Beulah property within 3 months by the buyer and which were not realized because of the negligence, breach of contract, and other reasons by plaintiffs.

G. Approximately $45,000 owed to Jagdish, Virendra and Surendra Berry as their participation in the residual profits of a 1% of the sale of the houses built on the Beulah property.

H. Approximately $225,000 owed to Jagdish, Virendra and Surendra Berry as their portion of the interest money earned from the deposits of the monies under the contract plaintiffs and plaintiff corporations.

* * *

137. That Jagdish Berry, Virendra Berry, and Surendra Berry are shareholders of Professionals, Inc. and Professionais I, Inc. and have invested approximately $240,000.00 between the two corporations.

138. That after June 30, 1985, Arvind K. Pathak met with defendants as part of the plan or schemes of the plaintiffs to gain access to the defendants to carry out the scheme of defrauding defendants of their monies and continued to misrepresent to defendants that plaintiffs were bona fide doctor investors who wanted just one project or opportunity to invest with defendants in a real estate project so that the plaintiffs could learn about real estate and continue to invest separate and apart from defendants. That at the time these misrepresentations were made the plaintiffs knew they were false since their plan or scheme was to defraud defendants of as much of defendant's monies as they could and defendants were not informed of the plans because otherwise the plan would have succeeded.

139. That as part of the schemes the plaintiffs individually visited the Beulah property to induce and misrepresent to defendants that there was a genuine interest and bona fide investor group in order to get the defendants to further invest and increase the monies plaintiffs could embezzle or defraud from defendants. That to visit the Beulah property the plaintiffs traveled in interstate commerce.

140. That plaintiffs from July to December of 1985 were not satisfied that the monies that could be realized from their

* * *were not going to provide the loans to defendants and would defraud them of their monies.

224. That defendants have repeatedly requested that plaintiffs distribute to them the monies of their investments and profits and plaintiffs, in accord with their schemes have refused to do so, which has resulted in defendants losing numerous opportunities to purchase properties. The defendants have lost at least $2,0000,000 because of these loans.

225. That on more than one occasion Mrs. Arvind K. Pathak stated that she could not understand why the defendants were so insistent in getting their monies, that the defendants were very wealthy and did not need the monies, and that the Pathaks had many obligations to meet and needed the monies and could not reimburse the defendants for the monies. This was all part of the schemes to defraud defendants of their monies.

226. That defendants request that the damages they have suffered be trebled as required under 18 U.S.C. 1964 and/or 18 U.S.C. 1961 et seq for a total of at least $6,000,000.00 to be paid jointly and severally by each and all of the plaintiffs. The defendants have suffered at least the following damages because the plaintiffs have embezzled and/or otherwise illegally taken over $1.890,000.00 from the defendants as represented by the following monies:

A. Over $300,000.00 earned by Berry Associates, Inc. as its 30% for its efforts that resulted in over $1,000,000.00 profits for The shareholders of the Beulah corporation.

B. Approximately $156,000 invested by defendants by defendants Jagdish, Virendra, and Surendra Berry in Plaintiffs Beulah Road (Professionals I, Inc.) corporation.

C. Approximately $90,000.00 invested by defendants Jagdish, Virendra, and Surendra Berry in plaintiff Greenbrier (Professionals, Inc.) corporation.

D. Over $175,000.00 belongings to defendants Jagdish, Virendra and Surendra Berry as their share of the profits of the Beulah corporation.

E. Over $400,000.00 of profits for Berry Associates, Inc. and/or A.J. Inc. which result from the breach of contract by plaintiffs by forcibly selling the Beulah property.

F. Over $500,000.00 of profits that resulted from the resale of the Beulah property within 3 months by the buyer and which were nor realized because of the negligence, breach of contract, and other reasons by plaintiffs.

G. Approximately $45,000 owed to Jagdish, Virendra and Surendra Berry as their participation in the residual profits of a 1% of the sale of the houses built on the Beulah property.

H. Approximately $225,000 owed to Jagdish, Virendra and Surendra Berry as their portion of the interest money earned from the deposits of the monies under the control of the plaintiffs and plaintiffs corporations.

I. That in addition to the monies taken from the defendants as indicated above, the activities of the plaintiffs have deprived the defendants of a series of business opportunities they would

* * *

VOLUME III

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION NO. 89-00787-A

PROFESSIONALS, INC., et al.,

Plaintiffs,

v.

JAGDISH P. BERRY et al.,

Defendants.

Wednesday, November 1, 1989
Alexandria, Virginia

Transcript of third day of trial proceedings in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:

(As heretofore noted:)

[521] sufficeint embezzled assets through those fictitious companies to purchase the remaining interest in the Beulah Corporation. The Berrys have represented to the Court that they have $250,000 tied up in these two corporation. They don't, Your Honor. They have $50,000 tied up in Greenbriar, which they put in on March 4th, 1986, and they have $55,000 which they put into the Beulah Corporation on June 20th, 1986, and every payment thereafter, Your Honor, has been financed from the funds embezzeled from these two corporations.

Part of the relief we are seeking with respect to Greenbriar, Your Honor, is therefore a declaration that they have no interest beyond that $50,000 due to the violation of Sections 1962(A) and (B).

Let me turn to the State law on fraud. Fraud, Your Honor, the six elements of fraud are also set forth in our proposed findings of fact. I think fraud has been proven here with such clarity that I don't want to go through each item. I think Your Honor can find those yourself.

Obviously many misrepresentations have been made by the Berrys. They found their ways onto the corporate books, and the corporation has been injured thereby.

The same thing with respect to breach of fiduciary duty. Mr. Jagdish Berry paid bills left and right to his brothers without even knowing what they were allegedly doing. Mr. Berry flipped the contract to defraud the corporation of [520] Your Honor. I was going to get to relief a little bit later. One is the violation of Section C of the relief section, whichever it is—I'm sorry—the 1962 section C pertains to the assets of Beulah that were lost to Beulah and that's the $15,000 for W.C.

In addition, we are seeking a declaration that the Berry's interest in the Beulah Corporation is limited to the $55,000 contribution they initially made in June of 1986. As I will indicate in a moment, Your Honor, the Berrys made use of the money that they had embezzled from the Greenbriar Corporation through General Construction Services, through S.B.S. and through Northern Virginia Construction. They made use of that to purchase the balance of their interest in the Beulah Corporation and the balance of their interest in Greenbriar.

That itself, Your Honor, is a separate violation of the RICO statute, separate from the embezzlement and the operating the enterprise through a pattern of racketeering activity, but it is the purchase and acquiring an interest in an enterprise with funds that had been obtained through

racketeering activity. That's a separate violation of RICO. It's a violation of paragraphs A and B of the RICO statute. So those are the primary relief that I am seeking with respect to the Beulah Corporation.

Turning to the Greenbriar Corporation, Your Honor,

* * *

§1962. Prohibited activities

(a) It shall be unlawf. .or any person who has received any income derived, directly or indirectly, from a pattern of racketeering activityor through collection of an unlawful debt in which such personhas participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or particpating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or partcipate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941.)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering anfy person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissoslution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the esseantial allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 943.)

Supreme Court, U.S.
FILED
SEP 10 1992
OFFICE OF THE CLERK

No. 92-281

IN THE

Supreme Court of the United States

October Term 1992

JAGDISH P. BERRY, *et al.*,

Petitioners,

v.

PROFESSIONALS, INC. and
PROFESSIONALS I, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether defendants should be absolved of Civil RICO liability because, in carrying out predicate acts of a RICO scheme, defendants also violated state criminal statutes?

(2) Whether a conflict among the Circuits is generated since the Court below held that relief granted at the trial court level constituted simply denial of Petitioners' counterclaim, and *not* equitable relief under RICO?

LIST OF PARTIES AND RULE 29.1 LISTING

Respondents adopt Petitioners' list of Parties and Rule 29.1 listing.

STATEMENT OF AFFILIATED PARTIES

Respondents Professionals, Inc., and Professionals I, Inc., have no parent or subsidiary corporations.

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IN THE

Supreme Court of the United States

October Term 1992

No. 92-281

JAGDISH P. BERRY, *et al.*,

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PROFESSIONALS, INC. and
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On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS AND JUDGMENTS BELOW

Respondents adopt Petitioners' references to Opinions and Judgments below.

JURISDICTION

Respondents adopt Petitioners' Jurisdictional Statement.

STATUTES INVOLVED

Respondents adopt Petitioners' Statement of Statutes Involved.

STATEMENT OF THE CASE

This action arose under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 USC § 1961, et seq., and resulted in a judgment by the trial court, sitting without a jury, in an amount in excess of $1.5 million. The District Court in this case made findings of fact, undisturbed by the Court of Appeals, which established that defendants undertook the following conduct which directly damaged plaintiffs. Defendants, having devised a scheme to defraud the plaintiffs, made numerous uses of the mail and wires in a violation of the mail and wire fraud statutes to induce investors to invest in a real estate development project, to bilk the investors by diverting the assets of the projects to defendants' coffers, to lull them into a false sense of security that the projects were being properly developed, and to divert an investigation by the plaintiffs and indeed by the court into their activities.

As part of the scheme of fraud, defendants made use of numerous artifices to divert the assets of plaintiffs to their own benefit, creating fictitious companies, embezzling funds, diverting corporate opportunities, paying themselves unauthorized salaries, etc. In order to divert suspicion, defendants created and mailed falsified corporate documents and even provided falsified documents to the Court.

As the District Court stated in its Remand Memorandum of Opinion and Findings of March 25, 1991:

> Each of the foregoing mailings was mailed with the intent to carry out some essential step in the execution of the "scheme to defraud" found by the court in its November 24, 1990 Memorandum Opinion. Many of the letters themselves do not disclose on their face that they were mailed in furtherance of the scheme to defraud; however, this is not

necessary if they were in furtherance of the scheme, which they were. Each separate mailing is a separate offense under 18 USC § 1341.

The seeking of contributions, holding of meetings, (false) advice as to the status of the corporations, and assurances of security were all in furtherance of the basic scheme. Each of the mailings constitute an act of "racketeering activity" as defined in 18 USC § 1961(1), and together they constitute more than the two such acts required for a "pattern of racketeering" under 18 USC § 1961(5). Moreover, these letters, as well as the telephone calls discussed later, were part of a continuous pattern which continued, right up to the time the Berrys were removed as officers of Beulah Corporation on October 9, 1988, and of the Greenbrier Corporation on December 11, 1988, furthering the goals of the scheme while attempting to forestall investigations by the plaintiff. ***This scheme and these acts caused and were designed to cause the damages sustained by the plaintiffs.*** They permitted the Berrys to obtain the assets of the plaintiffs, retain them, and forestall the plaintiffs' investigations by false assertions and threats.

As indicated, the acts were all related to the common scheme, and they continued until the Berrys were removed and even beyond. This action was filed on May 23, 1989. Had the fraud not been uncovered and laboriously pursued, there is no question that there would have been continuing criminal activity.

Appendix at pp. 17a-18a (emphasis added).

In its original Memorandum Opinion the District Court had found as follows:

> The court finds, as more specifically set forth in the attached findings, that the individual defendants, using the vehicle of the enterprise Greenbrier Corporation, embarked, in the development of that property, on a pattern of racketeering, including false invoices, forged checks, fictitious entities (Northern Virginia Construction, SBS Construction and General Construction Services), "flipping" the contract on Greenbrier Lot 9, cash disbursements ($23,000 without any supporting documents), and unauthorized and unrevealed loans, salaries and payments to the members of the Berry family for work not done and for which there is no supporting documentation, in order to drain off the profits of Greenbrier, and to present a picture of diminished profits to the stockholders. During and after this activity the defendants acted to cover up their activities by refusing the plaintiff-stockholders access to corporate books and records, altering the check register (which was the only source of financial information for the company's CPA), denying the stockholders information, filing lawsuits and suggesting that a witness lie. The plaintiffs were forced to go to the state court to secure access to the financial books and records. Even after issuance of an order for such access, the order had to be enforced through issuance of a show cause order for contempt.
>
> The RICO fraud was accomplished in part by the many letters and telephone calls between the individual defendants and the plaintiffs, clearly sufficient predicate acts for RICO. Moreover the rack-

> eteering activity was continuous, and there was clearly a relationship between the mailings and telephone calls and the fraud in that they were all designed to and did further the scheme and mislead the investors.
>
> * * *
>
> This is not a close case. The excesses of the defendants are so blatant as to be crude, and their sanctimonious protests in testimony that they had the plaintiff's best interest at heart are incredible, as are the glib explanation for the expenditures and disbursements.

Appendix at pp. 2a-4a.

In its accompanying Memorandum, the District Court enumerated the specific items of damage directly suffered by plaintiffs, and entered a judgment under RICO, trebling these sums. Appendix at 4a-6a. This judgment was affirmed by unpublished Opinion by the United States Court of Appeals for the Fourth Circuit. Appendix at 22a-30a.

ARGUMENT

The Petition for Writ of Certiorari should be denied. Defendants argue that this case presents legal issues relating to proximate cause of damages under RICO and whether equitable relief under RICO is available to private litigants. It does not. The decision below by the Fourth Circuit was an unpublished decision, carrying no precedential value.

Further, this was a heavily fact intensive case.[1] The Fourth Circuit Court of Appeals opinion did not create or purport to

[1]The District's Court original Findings of Fact which are not reproduced in Petitioners' Appendix were fifty-six pages long.

create new law. It merely applied existing law to the facts of the case.

Although petitioners strenuously attempted to urge the Fourth Circuit to construe some of the disposition entered by the District Court as "equitable relief" under RICO, the Fourth Circuit properly found the relief to have been simply a denial of petitioners' counterclaim and not relief under RICO[2]. The Fourth Circuit refused to even consider — much less decide — the issue of whether equitable relief was available under RICO.

A. Proximate Cause Issue

Petitioners set forth no compelling reason for this court to grant their Petition for Writ of Certiorari with respect to their alleged proximate cause issue. Indeed, in their argument petitioners concede that they did, through a pattern of racketeering activity, conduct numerous predicate acts over a lengthy period of time which they also concede "could fairly be said to have caused the injuries" suffered by Plaintiffs. Petition for Writ of Certiorari at 18. They concede that they were the perpetrators of the criminal activity and that plaintiffs suffered the damages for which relief was awarded. They contend however that because in conducting the fraud (which is a necessary ele-

[2]The District Court made the following observations concerning defendants' counterclaim:

> There was absolutely no evidence adduced on the counterclaim. Given the nature of the allegations in these claims, namely, fraud, embezzlement, libel, slander and implication of plaintiffs' counsel, it can only be viewed as a further attempt to intimidate the plaintiffs in order to discourage inquiry into the true nature of defendants' dealings. In the absence of any evidence to support the allegation, a Rule 11 inquiry is suggested. Because the RICO award is itself punitive, however, the court will not pursue this.

Appendix at p. 4a.

ment of the mail fraud and wire fraud statutes), they engaged in *other* criminal activity, such as embezzlement and common law fraud, this should relieve them from RICO liability. Their argument seems to be that where a plaintiff's damages are directly linked to *the fraud* perpetrated in furtherance of the mail fraud scheme rather than the mailing[3] itself, then plaintiffs shouldn't be able to recover damages under RICO. Petitioners seek solace from the recent case of *Holmes v. Securities Investor Protection Corp.*, ____ US ____, 112 S.Ct. 1311 (1992). In *Holmes* this court agreed with all of the circuits which had addressed the issue that proximate cause is necessary in order to award damages in a RICO action. Indeed this court cited *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988) as requiring proximate cause in the Fourth Circuit. The court below in this case cited the case of *Morley v. Cohen*, 888 F.2d 1006 (4th Cir. 1989) in its discussion of the proximate cause requirement. *Morley* in turn cited *Brandenburg* for that same proposition. Everybody agrees that proximate cause is necessary. There simply is no issue for this court to address.

Since this is an unpublished decision which simply applied existing law to the facts of this case, petitioners' seeking review here does not relate to any concern about global application of this case in future matters, but merely to their personal belief that by being subjected to RICO damages they have been personally wronged.

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[3]The mail fraud statute states: "Whoever, *having devised . . . any scheme . . to defraud*, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office . . . shall be fined not more than $1,000 or imprisoned not more than 5 years, or both". 18 USC § 1341 (emphasis added). Petitioners' argument is that if the injury actually results from the *fraudulent scheme* which is a portion of the mail fraud statute, damages cannot be granted if the fraudulent scheme includes violations of state criminal law. This is circular reasoning. If the fraudulent scheme, which is part of the mail fraud statute, causes the damage then the mail fraud causes the damage.

Petitioners also seek to suggest that because the *Holmes* decision was rendered shortly before the decision of the Fourth Circuit in this case, the court below must not have been aware of the *Holmes* decision[4]. The Holmes case was decided on March 24, 1992 and the panel decision below on April 2, 1992. A Petition for Re-hearing was filed by petitioners on April 16, 1992 and denied by the Fourth Circuit on May 13, 1992. Even if petitioners' speculation of the Fourth Circuit's lack of awareness of *Holmes* were true, there was plenty of time for that to be remedied during the period it considered Petitioners' Petition for Rehearing.

Further, petitioners' suggestion that the decision below was inconsistent with *Holmes* is incorrect. Both cases recognized the necessity of proximate cause in assessing damages. The *Holmes* court was concerned with "allowing suits by those injured only indirectly". *Holmes*, 112 S.Ct. at 1321, citing *Associated General Contractors of Cal., v. Carpenters*, 459 U.S. 519, 545 (1983). The *Holmes* court stated "we hold not that RICO cannot serve to right the conspirators wrongs, but merely that the non-purchasing customers or SIPC in their stead, are not proper plaintiffs." *Holmes*, 112 S.Ct. at 1321. In this case it is undisputed that the defendants were the ones who perpetrated the wrongs, that the wrongs caused damages, and that the plaintiffs were the ones harmed by the wrongs and who suffered the damages. *Holmes* does not change that. Accordingly there is simply no proximate cause issue for this court to address.

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[4]Since this case was argued on October 30, 1991 and the decision not issued until April 2, 1992, a fairer assumption would be that the Fourth Circuit was awaiting issuance of *Holmes* before releasing its decision, to ensure that *Holmes* did not conflict with it.

B. Equitable relief under RICO

Petitioners raise a straw argument which they wish this court to decide regarding the availability of equitable relief to private party litigants under RICO. The issue of whether equitable relief is available to private parties under RICO was not decided by the Court of Appeals opinion below. Accordingly there is again no issue for this court to address.

Petitioners argued strenuously and valiantly to the Fourth Circuit that the denial of the relief requested by them in their counterclaim ought to be construed as equitable relief under RICO on the main complaint and that the relief should be reversed as impermissible in private RICO litigation. The fallacy in petitioners' position before this Court is that the Fourth Circuit *refused* plaintiffs' invitation and specifically declined even to address this issue, much less issue a decision which is in conflict with other circuit courts. In fact, Petitioners are urging this Court to address an issue — the availability of equitable relief to private parties under RICO — which was *not* decided or addressed by the Fourth Circuit and which was *not* decided or addressed by the District Court. Plaintiffs' Petition for Writ of Certiorari on this issue is simply wishful thinking on their part that the Fourth Circuit had in fact addressed the issue.

The novelty of Petitioners' argument, as noted by the Court below, is revealed by the following. The portion of the District Court's order which Petitioners contend constitutes equitable relief under RICO is contained in the following paragraph:

> 3. The defendants' interest in Professional I, Inc., is declared to be limited to $50,000.00, and in Professionals, Inc., to $55,000.00, and that the 30% fee is declared not to be owed Berry Associates or A.J., Inc.

Appendix at 7a.

In their counterclaim, Petitioners sought as relief both recovery of amounts allegedly invested over and above $105,000 plus a "development fee" of 30%. That paragraph 3 of the District Court's Order is a denial thereof is plain on its face. Petitioners apparently concede that the rejection of the 30% development fee is denial of their counterclaim, but suggest that the District Court in its paragraph 3 intended to be *granting* plaintiffs' equitable relief under RICO in the first part of its sentence, and *denying* petitioners relief requested in their counterclaim in the last part. It makes far more sense to read the entire sentence as a denial of relief sought by the counterclaim.

The Fourth Circuit's resolution of this issue was as follows:

> In their counterclaim, the Berrys alleged RICO and state law violations and sought various remedies including payment of the 30 percent development fee for the sale of the Beulah Road property. In addition to the return of their capital contributions, the Berrys also demanded that Professionals return approximately $1,500,000 allegedly invested in or earned through the development of the properties. The district court correctly dismissed the counterclaim, finding that the development fee was not owed to the Berrys and determining that the Berrys' interest in the properties was $105,000 the amount they originally invested. Raising the novel argument that dismissal of their counterclaim amounted to a grant of equitable relief to Professionals, the Berrys challenge the order of dismissal as beyond the power of the court. We find this argument to be without merit. The district court simply denied the Berrys the relief they requested.

Appendix at 30a.

However interesting the issue may be when it does arise in the proper case as to whether private equitable relief is permissible under RICO, this simply is a case as to which that issue has not been confronted either at the Distic' Court's level[5] or the Fourth Circuit. Accordingly, were this court to address the issue it would be for the first time in this case, and constitute nothing more than an advisory opinion.

C. Conclusion

The unpublished decision below does not address any new issues of law. There is no sound basis for this Court to grant the Writ of Certiorari. It should be denied.

Respectfully submitted,

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[5]Indeed defendants did not even argue before the District Court that equitable relief under RICO is not permissible, even though as they now point out to this court equitable relief was sought by plaintiffs. Having failed to raise this argument at the trial level, it should be deemed waived.